IN THE UNITED STATES SUPREME COURT

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SUPREME COURT, U.S.

HOYT WEAVER,
PETITIONER

-VS-

ROBERT GRAHAM, GOVERNOR,
RESPONDENT

CASE NO.

79-5780

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA, IN CASE #56,707

* * * * * * * * * * * * * * * * *

OPINIONS

The Supreme Court of Florida denied relief, per curium, the 1st day of November 1979, citing Harris v Wainwright, #56,716 (Nov. 1st, 1979). (Copies of both decisions hereto attached.)

STATEMENT OF GROUNDS

The State Supreme Court of Florida decided in a manner conflicting with recent decisions of The State Supreme Court of Louisiana and in open conflict with prior decisions of The Supreme Court of The United States on a Constitutional Issue (Article I, Section 9 and Article I, Section 10, Constitution of The United States); - and is a matter of great public interest since it affects approximately 20,000 Florida prisoners.

The decision was handed down the 1st day of November, 1979 and this Court has jurisdiction under Title 28, Section 1651.

THE QUESTIONS PRESENTED

1. Where a statute is enacted after the commission of an offense which materially alters the situation of the accused to his material disadvantage is the application of such statute to the accused ex post facto?
2. Is it proper for a State Supreme Court to merely paraphrase a Response filed by Respondent Governor as to a constitutional claim; or must such Supreme Court consider the merits and find its own conclusion?

CONSTITUTIONAL PROVISIONS

This case involves Article I, Section 9 and Article I, Section 10, Constitution of The United States and the Due Process Clause of the Fourteenth Amendment.

It presents Chapter 20, Florida Statutes 944.27, 944.271 and 944.29 all

repealed; as opposed to Florida Statute 944.275.

STATEMENT OF THE CASE

In 1976 Petitioner was convicted of Second Degree Murder for a crime occurring in 1976 and sentenced to Fifteen Years in prison on May 13, 1976.

Petitioner was processed through Lake Butler Reception Center at Lake Butler, Florida and his expiration date was set in 1984. (EXHIBIT "A")

When Petitioner saw the Parole Examiner in March, 1979 Petitioner learned his expiration date was being changed due to the enactment of a new statute (Florida Statute 944.275).

In March, 1979 Petitioner filed a Petition for Writ of Habeas Corpus to The Supreme Court of Florida citing an ex post facto application of the new law, Florida Statute 944.275.

The States response to Order to Show Cause set Petitioner's new expiration date at February 2, 1987 (which alteration included a loss of 165 days forfeited due to disciplinary incidents) as of January 1, 1979. (EXHIBIT "B")

In his Reply to the States Response Petitioner incorporated the arguments of a companion case, William P. Besser v Robert Graham, Case #57,021 (For the Court's convenience a complete copy of case 57,021 absent exhibits is appended hereto - Besser's filing, Order to Show Cause, Response; and Reply to Response).

On November 1, 1979 the Florida Supreme Court denied, citing Harris v Wainwright, #56,716 (November 1, 1979) as authority. (Besser was also denied on the same basis.)

ARGUMENT

Petitioner was convicted in 1976 for acts occurring in 1976.

Petitioner entered the Florida Prison System about May 13, 1976 and was given 2340 days "gain time" and informed that he would have to serve 3135 days minus any "additional earned gain time" subject to possible forfeitures of gain time credits for disciplinary infractions. His release date was set in 1984.

In 1979 his release date was changed to 1987.

The 1978 session of the Florida Legislature repealed Statute 944.27, 944.271 and 944.29; - and enacted, in their places, Florida Statute 944.275. (Copies in Appendix)

A fair reading shows that the only difference in the Statute change is in the Statutory Gain Time allowed under 944.27 from 5 days per month for the first

2 years; 10 days per month for the second 2 years; and, 15 days per month for each succeeding year; - to 3 days per month for the first 2 years; 6 days per month for the second 2 years; and, 9 days per month for each succeeding year.

The new gain time law, enacted to take effect over a year after commission of the offense charged, changed the expiration date from 1984 to 1987.

The only question before the Court; can a State Legislature enact a law after commission of an offense which adds over two years to the penalty contemplated by law at the time of the commission?

Such is obviously a direct violation of the requirement of Article I, Section 9 and Article I, Section 10, Constitution of The United States, that no state may enact or enforce an ex post facto law.

The Supreme Court of Florida not only condoned the unconstitutional application of that ex post facto law (Florida Statute 944.275) but was in conflict with The Supreme Court of Louisiana on the precise issue in two recent decisions of that Court.

In Curtis v State, 363 So 2d 1375 at 1383 that Court held:

> We must therefore conclude that our recent Wilson decision is incorrect and must be overruled. That the change in the law affecting the opportunity to earn a diminished sentence did not deprive a defendant of any vested right to good time does not alter the fact that the statute applies a new punitive measure to a crime already consummated to the detriment or material disadvantage of the wrongdoer (see Lindsey) and that it has the effect of making the standard of punishment "more onerous" through its effect on release eligibility (see Bullock). State v Curtis, 363 So 2d 1375 at 1383 (Appended)

On the 21st day of October, 1978 The Supreme Court of Louisiana, in its decision covering the exact situation here, ruled opposite to The Florida Supreme Court's holding in the instant case, stating:

> (1) statutory amendment requiring good time for inmates convicted after September 9, 1977 to be computed on basis of 15 days per month rather than the 25 days as before would violate ex post facto constitutional prohibitions if applied to persons who committed offenses on or prior to the date. . . State ex rel Bickman v Dees, 367 So 2d 283 at 284 (La. Dec. 21, 1978) (Appendix)

The decision in this case by The Supreme Court of Florida is in direct conflict with this Court's holding in:

> . . . .But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within the Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated. Wolff v McDonnell, 94 S.Ct. 2963 at 2975 (Appendix).

The holding of this, and other Courts, have been so consistent that Florida's Supreme Court appears to be attempting to overturn the Federal Constitution in order to protect its Department of Corrections,

Realizing that Florida's Department of Corrections did recompute all release dates, regardless of date of offense or conviction and thereby applied the new gain time statute to some 20,000 inmates in an ex post facto manner at some cost to the Department; Respondent may not, through his Supreme Court, offer such monetary expenditures as a reason for the decision rendered in Weaver v Graham, #56,707 Florida Supreme Court for, with many similar cases filed, the Court ruled:

> Per Curium:
> . . . .denied. See Harris v Wainwright, #56,716.

The text of the Harris decision, compared with Petitioner's Reply to Response and the filings in Besser v Graham, #57,021, show that The Supreme Court of Florida did not decide the issue on the merits but relied entirely upon the Response filed by the Florida Attorney General (Appended with Opinions included).

For these reasons, Petitioner moves the writ issue.

Respectfully submitted,

Hoyt Weaver, #053366, pro se
Post Office Box 1100 - 1514
Avon Park, Florida 33825

PROOF OF SERVICE

I, HOYT WEAVER, do hereby certify that a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA, IN CASE #56,707 has been furnished Attorney General Jim Smith, Counsel for Respondent, addressing same to his Tallahassee address, by United States Mail this the 6 day of DECEMBER, 1979.

HOYT WEAVER, pro se

APPENDIX---CONTENTS

I. Decision, Weaver v Graham, Fla Supreme Court, November 1, 1979
REFERENCE: Petition, page one. (Fla Supreme Court # 56,707)

II Decision, Harris v Wainwright, Fla Supreme Court, November 1, 1979 REFERENCE: Petition page one. (Fla Supreme Court # 56,716)

III. Litigation, Complete filing Weaver v Graham, Fla Supreme Court REFERENCE(As Marked): Exhibits A and B, page two of Petition.
(Fla Supreme Court # 56,707)

Exhibit A: Appended to Original Petition by Weaver.

Exhibit B: Appended to State's Responce, Affidavit L.L. Wainwright.

IV. Litigation, Complete filing Besser v Graham, Fla Supreme Court. (Fla Supreme Court # 57, 021)
REFERENCE: Petition page two

V. Cited Materials

United States Constitution

Article I, Section 9

Article I, Section 10

Florida Statutes

Chapter 20, Florida Statute 944.27

Chapter 20, Florida Statute 944.271

Chapter 20, Florida Statute 944.29

Chapter 20, Florida Statute 944.275

VI. Cited Cases

State v Curtis, 363 So 2d 1375 (la 1978)

State ex rel Hickman v Dees, 367 So 2d 283 (La 1978)

Wolff v Mc Donnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L Ed 935 (1974)

In Clerk's Office

IN THE SUPREME COURT OF FLORIDA

HOYT WEAVER,

Petitioner,

-v- CASE NO. 56,707

ROBERT GRAHAM,
Governor,

Respondent.

RESPONSE

COMES now respondent, by and through his undersigned attorneys, and makes this response to the order to show cause heretofore issued in the captioned proceeding on June 25, 1979 and says:

I.

Petitioner is held in custody pursuant to a commitment issued May 13, 1976, copy of which is attached as Exhibit 1.

II.

Petitioner complains that he is being deprived of "good time" by an ex post facto law. In essence, it is claimed that since Section 944.275, Florida Statutes, effective July 1, 1978, permits the accummulation of a lesser amount of "good time" then did its predecessor, Section 944.27, then the application of the new statute to petitioner in the computation of his gain time makes the statute an ex post facto law because it was not in effect at the time petitioner was convicted and sentenced. Respondent disagrees. Appellate courts throughout the country have repeatedly recognized that the allowing of gain-time is an act of grace and that a prisoner has no right to receive gain time in the absence of a legislative provision therefor. In other words, gain time

(allowance) is an act of grace (rather than a vested right and) may be withdrawn, modified, or denied. Please see A.G.O. 078-96, copy of which is attached as Exhibit 2. For the holding of other appellate courts on this issue, please see: Graham v. Thompson, 246 F.2d 805 (10th Cir. 1957); People ex rel. Kleinger v. Wilson, 5 N.Y.S.2d 934 (S.Ct.App.Div. 3 1938); Gilstrap v. Clemmer, 284 F.2d 804 (4th Cir. 1960); Kastel v. Fish, 36 F.Supp. 700 (D.C.Md. 1931); Estrabrook v. King, 119 F.2d 607 (8th Cir. 1941); Comerford v. Commissioner of Correction, 141 N.E.2d 893 (Mass. 1957); Comerford v. Massachusetts, 233 F.2d 294 (1st Cir. 1956), cert. denied 352 U.S. 899; Lembersky v. Parole Board of Dept. of Correction, 124 N.E.2d 521 (Mass. 1955); People ex rel. Colletti v. Pate, 201 N.E.2d 390 (Ill. 1964); Hiatt v. Compagna, 178 F.2d 42 (5th Cir. 1949), aff'd 340 U.S. 880; Shattuck v. Grider, 493 P.2d 829 (Okla.Crim.App. 1972), citing Dear v. Mayo, 14 So.2d 267 (Fla. 1943), with approval.

III.

Although Section 944.275 was effective July 1, 1978, it was not implemented until January 1, 1979. This means that petitioner's gain time was computed under the provisions of Section 944.27 up until January 1, 1979 and thereafter computed pursuant to the provisions of Section 944.275. So that petitioner may have an up-to-date computation of his time and a tentative expiration date, respondent attaches the affidavit of Louie L. Wainwright showing the computation of petitioner's time and a projected release date of February 2, 1987, the same being attached as Exhibit 3.

IV.

Each and every allegation challenging the legality of petitioner's incarceration not heretofore specifically answered or denied is hereby severally denied and the contrary allegation lodged.

CONCLUSION

The petition for writ of habeas corpus should be denied.

JIM SMITH
Attorney General

By: Wallace E. Allbritton
WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR RESPONDENT
The Capitol
Tallahassee, Florida 32301

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Response to Mr. Hoyt Weaver, #053366, P.O. Box 1100, Avon Park, Florida, by mail, this 6th day of July 1979.

Wallace E. Allbritton
WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel

Supreme Court of Florida

No. 56,716

HENNARD HARRIS, Petitioner,

vs.

LOUIE L. WAINWRIGHT, Respondent.

[November 1, 1979]

ADKINS, Acting Chief Justice.

In original habeas corpus proceedings, petitioner asserts that section 944.275 Florida Statutes (1978 Supplement) is unconstitutional as it is applied to him, in that he is harmfully required to remain in prison for an indeterminate number of months or years past the original expiration of the sentence under the law as it existed at the time of the offense. This statute, known as the "gain time statute" requires the Department of Corrections to grant deduction for gain time on a monthly basis, as earned, from the sentence of every prisoner who has committed no infraction of the rules of the department or of the laws of the state and who has performed in a satisfactory and acceptable manner the work, duties, and tasks assigned.

Petitioner says that under the former law, section 944.27 Florida Statutes (1977) he was credited with all of his statutory gain time in advance at the time he was received into the custody of the Department of Corrections.

The new law (1978) is different from the former law (1977) in that there is an award of three days per month instead of five for the first two years; the award of six days per month instead of ten for the second two years; and the award of nine days per month instead of fifteen for anything over four years service of sentence.

Instead of awarding or crediting a prisoner with the statutory gain time at the old rate according to the number of years sentenced and time served, the Department of Corrections would credit such

gain time monthly (rather than in advance) at the new lesser rate and then only according to the number of years served. The "up front" awarding of gain time under the prior law was merely an administrative method by which an expiration date of sentence was tentatively calculated. Under either the old law or the new, gain time, whether it be what is normally considered "statutory" or "extra", only comes into play if a given inmate conducts himself in such a way as to deserve the gain time. Therefore, any notion of gain time can only be considered, at best, as conditionally vested.

Petitioner says that the statutory gain time credited in advance by the Department of Corrections under section 944.27, Florida Statutes (1977) was the custom by departmental rule and thus has become a vested right, at least insofar as petitioner is concerned. He says that the department entered into a binding contractual arrangement when petitioner entered prison that he would be able to receive and keep the statutory gain time in the absence of disciplinary problems. Petitioner contends that he is being deprived of "good time" by an ex post facto law. In essence, it is claimed that since section 944.275, Florida Statutes (1978) permits the accumulation of a lesser amount of good time than did its predecessor, section 944.27, Florida Statutes (1977), then the application of the new statute to petitioner and the computation of his gain time makes the statute an ex post facto law as it was not in effect at the time petitioner was convicted and sentenced.

Appellate courts throughout the country have repeatedly recognized that the allowing of gain time is an act of grace and that a prisoner has no right to receive gain time in the absence of a legislative provision therefor. In other words, gain time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied. See Gilstrap v. Clemmer, 284 F.2d 804 (4th Cir. 1960); Hiatt v. Compagna, 178 F.2d 42 (5th Cir. 1949) aff'd. 340 U.S. 880 (1950); Estrabrook v. King, 119 F.2d 607 (8th Cir. 1941); Kastel v. Fish, 36 F. Supp. 700 (D.C. Md. 1931); Shattuck v. Grider, 493 P.2d 829 (Okla.Crim.App. 1972) citing with approval Dear v. Mayo, 153 Fla. 114, 14 So.2d 267 (Fla. 1943); People ex rel. Coletti v. Pate, 201 N.E.2d 390 (Ill. 1964); Comerford v. Commissioner of Correction, 141 N.E.2d 893 (Mass. 1957); Lembersky v. Parole

Board of Department of Correction, 124 N.E.2d 521 (Mass. 1954).

Although section 944.275, Florida Statutes, was effective July 1, 1978, it was not implemented until January 1, 1979. This means that petitioner's gain time was computed under the provision of section 944.27, Florida Statutes (1977), until January 1, 1979, and thereafter computed pursuant to the provision of section 944.275, Florida Statutes (1978).

Mayo v. Lukers, 53 So.2d 916 (Fla. 1951) recognizes that the right to gain time is not a vested one and that it is obviously dependent on the course of the conduct of the inmate. This Court has emphasized the legislature's power to make whatever changes it deems prudent in the gain time procedure. In Dear v. Mayo, 153 Fla. 164, 14 So.2d 267 (Fla. 1943), this Court said that parole and gain time is granted by the sovereign as a matter of grace rather than of right and that the state may offer such grace under and subject to such conditions as it may consider most conducive to accomplish the desired purpose. In Kimmons v. Wainwright, 338 So.2d 239 (1st DCA 1976), the court said that gain time is given to prisoners through the beneficence of the legislature, and the legislature has full authority to establish the terms and conditions thereof.

This is not a situation in which a new law has been passed eliminating the allowance of gain time in certain situations. Dowd v. Sims, 229 Ind.54, 95 N.E.2d 628 (Ind. 1950). This is not a situation in which the entire scheme of criminal penalties has been revised. Goldsworthy v. Hannifin, 86 Nev. 252, 468 P.2d 350 (Nev. 1970). It is not a situation in which the length of incarceration for juvenile offenders has been extended. In re Dewing, 564 P.2d 375 (Cal. 1977); In re Valenzuela, 79 Cal.Retr. 760, 275 Cal.App.2d 483 (3d Dist. 1969). Likewise, it is not a situation involving a new and different interpretation of existing law. Love v. Fitzharris, 460 F.2d 382 (9th Cir. 1972).

The petition for writ of habeas corpus is denied.

It is so ordered.

BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., Concurring

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Original Jurisdiction - Habeas Corpus

Hennard Harris, in proper person, Raiford, Florida,

for Petitioner

Jim Smith, Attorney General; and A. S. Johnston, Assistant Attorney General, Tallahassee, Florida,

for Respondent

IN THE SUPREME COURT OF FLORIDA

HOYT WEAVER
Petitioner

-VS-

CASE NO. 56,707

ROBERT GRAHAM, GOVERNOR
Respondent

PETITIONER'S REPLY TO RESPONSE OF RESPONDENT

Comes now the Petitioner, Hoyt Weaver, in proper person, and replies to the response of Respondent.

Petitioner would show:

1. Petitioner's filing of March 16, 1979, contended that his expiration date had been recomputed pursuant to Florida Statute 944.275 with an effective date of January 1, 1979. This claim is conceded by Respondent and is not, therefore, at issue.

2. Petitioner further contended that such application of the above cited Statute as to Petitioner constituted the enforcement of an ex post facto law by Respondent in that the criminal conduct giving rise to Petitioner's imprisonment occurred prior to the effective date of Florida Statute 944.275, and that the application of Florida Statute 944.275 as to Petitioner, is clearly detrimental to Petitioner.

3. Respondent's response is apparently based solely on a claim that statutory gain time is an act of grace by the Legislature rather than a vested right although, by reference to Attorney General Opinion 078-96 (Respondent's Exhibit 2), Respondent also contends "....nothing in HB 811 imposes an additional penalty for a crime already committed or makes more severe punishment already imposed, and nothing in the bill purports to deprive any inmate of any vested, enforceable right." (Respondent's #2 at Page 2).

4. Both claims by Respondent are without merit. At the time Petitioner entered the Florida Prison System Petitioner did acquire a vested right to the expiration date established for his sentence pursuant to Florida Statute 944.27, the gain time law in effect at the time of the criminal conduct for which he stood convicted. This Statute, when applied to Petitioner's sentence, did specify, with particularity, a date certain when Petitioner's actual imprisonment would terminate

and conditional release would begin. His gain time pursuant to 944.27 was awarded to him in advance and could be taken or forfeited only for certain breeches of prison rules or the law and only in the presence of certain procedural safeguards. This date has now been altered pursuant to Florida Statute 944.275 to Petitioner's disadvantage. Relief is mandated by the following U.S. Supreme Court and Florida Supreme Court Cases:

1. Calder v Bull, 3 US (3 Dall) 386, 390, 1 L Ed 648 (1798)
2. Cummins v Missouri, 4 Wall 277, 18 L Ed 356, 71 US 277 (1866)
3. Kring v Missouri, 107 US 221, 2 S Ct. 443, 27 L Ed 506 (1882)
4. In re Medley, 134 US 160, 10 S Ct. 384, 33 L Ed 835 (1890)
5. Duncan v Missouri, 152 US 377, 14 S Ct. 570, 33 L Ed 485 (1894)
6. Thompson v Utah, 170 US 343, 18 S Ct. 620, 42 L Ed 1061 (1898)
7. Malloy v S Carolina, 237 US 180, 35 S Ct. 507, 59 L Ed 905 (1915)
8. Lindsey v Washington, 301 US 397, 57 S Ct. 797, 81 L Ed 1182 (1937)
9. Higginbottom v St., 88 Fla 26, 101 So 233 (Fla 1924)
10. Wilensky v Fields, 267 So 2d 1 (Fla 1972)

5. Documents unavailable to Petitioner at the time of the original filing demonstrates the effect of this application. Petitioner's Exhibit A, reflecting a T.E.D. of December 31, 1984, and Respondent's Exhibit 3 (Petitioner's Exhibit B), reflecting a T.E.D., because of the recomputation pursuant to Florida Statute 944.275, of February 2, 1987.

6. A fuller and more complete analysis of Respondent's legal argument demonstrating the absence of merit and reflecting unequivocally that Petitioner is entitled to the relief sought is appended hereto (Petitioner's Exhibit C) and is "Petitioner's Reply", absent Petitioner's exhibits, filed in William P. Besser v Robert Graham, Case No. 57,021, which argument, with all other law and argument submitted by Petitioner Besser, Petitioner would respectfully incorporate by reference. (See sections I-V, pp 2-7, Exhibit C, excluding facts applicable solely to Petitioner Besser.)

WHEREFORE, on the basis of the foregoing and attached Petitioner has demonstrated:

1. That when Petitioner entered the Florida Prison System, the Department of Corrections, applying Florida Statute 944.27, established a date certain for Petitioner's release from actual imprisonment on conditional release;

2. That due to the retroactive application of Florida Statute 944.275, as to Petitioner by Respondent, this date certain has been changed to Petitioner's disadvantage; and,

3. Such application by Respondent of Florida Statute 944.275 as to Petitioner is in direct violation of the Florida Constitution: Article I, Section 10; Article X, Section 9; and The United States Constitution Article I, Sections 9 and 10.

The Writ should issue.

Respectfully submitted,

Hoyt Weaver

Hoyt Weaver #053366 (pro se)
P.O. Box 1100, Slot 1514
Avon Park, Florida 33825

PROOF OF SERVICE

I hereby certify that true and exact copies of this Reply to Response, Exhibits A, B, and C, and this Proof of Service are furnished Counsel for Respondent at his Tallahassee address.

Hoyt Weaver

Hoyt Weaver (pro se)

EXHIBIT A NOTE: EXHIBIT B from State's #3
C Bess ork Bessen's Reply Brief

FLORIDA PAROLE AND PROBATION COMMISSION
OBJECTIVE PAROLE GUIDELINES WORKSHEET

Inmate Number: 053366 Inmate Name: Hoyt Weaver

TE: 12-31-84 Institution: Avon Park C.I. Date of Interview: 3-7-79

ITEM A

Number of All Prior Convictions
Three or more prior convictions=2
One or two prior convictions=1
No prior convictions (adult or juvenile)=0 [2]

ITEM B

Number of Prior Incarcerations
Two or more prior incarcerations=2
One prior incarceration=1
No prior incarcerations=0 [2]

ITEM C

Total Time Served in Years
Two or more years served=2
Up to two years served=1
No time previously served=0 [2]

ITEM D

Age of First Commitment (Adult or Juvenile)
17 years or younger=2
18 - 25 years=1
26 years or older=0 [1]

ITEM E

Number of Prior Parole Revocations or MCR Revocations
One or more prior revocations=1
No prior revocations=0 [1]

ITEM F

Number of Prior Escapes
One or more prior escapes=1
No prior escapes=0 [0]

ITEM G

Burglary as Present Offense of Conviction
Present offense involves burglary=1
Otherwise=0 [0]

TOTAL SCORE 8

OFFENSE CHARACTERISTIC: 2nd degree Murder — Armed Robbery 5-15-76
Life 1-31-76

Matrix Time Range ~~78-120~~ 120 +	County Jail Credit ~~107~~ (days)
Recommended Time	Time Since Sentence ~~33.2~~ (no. & days)
	Total Time Served ~~37.4~~ (no. & days)

AGGRAVATING/MITIGATING CIRCUMSTANCES (Circle as appropriate; Insert Code No., Category and Explanation)

36
1
37
24
4
33

INMATE OR EXAMINER CONTEST OF SCORING: (Explain in detail)

RECOMMENDED PRESUMPTIVE PAROLE RELEASE DATE: 1-31-86

ACKNOWLEGEMENT OF INTERVIEW:

Inmate Signature 1-31-76 Examiner SDI

Dept. of Corrections Representative 1-31-86 Examiner

Form A: 1 Copy to Inmate
1 Copy to institution file

4

FORM DC-9 STATE OF FLORIDA REVISED 1-68

UNIFORM COMMITMENT TO CUSTODY OF DIVISION OF CORRECTIONS

CIRCUIT COURT CRIMINAL JUSTICE DIVISION
(Court)

HILLSBOROUGH County. SPRING Term, 19 76

Conviction for MURDER IN THE SECOND DEGREE
(Offense)

Date of conviction MAY 13th, 1976

Date of sentence imposed MAY 13th, 1976

Term of sentence FIFTEEN (15) YEARS with credit time from January 31, 1976

STATE OF FLORIDA,

Plaintiff,

vs.

Hoyt Weaver
Defendant.

O 53366

JUN 7 1976

"Case No. #76-739 B"

"WHITE MALE"

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DIVISION OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of

~~(Indictment)~~ X (Information)

judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the custody of the Division of Corrections of the State of Florida; and this is to command you, the said Division of Corrections, by and through your director, superintendents, wardens, and other officials, to keep and safely imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Division of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable Charles H. Scruggs, III
James F. Taylor, Jr.
Judge of said Court, as also

Clerk, and the Seal thereof, this the 13 day of May, 19 76

James F. Taylor, Jr.
Clerk of said Court

BY Jacqueline Burns D.C.

(To be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)

Exhibit 1

Supreme Court of Florida

No. 56,707

HOYT WEAVER, Petitioner,

vs.

ROBERT GRAHAM, Governor, Respondent.

[November 1, 1979]

PER CURIAM.

The petition for writ of habeas corpus is denied. See Harris v. Wainwright, Case No. 56,716 (Fla. Nov. 1, 1979).

ADKINS, Acting Chief Justice, BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Original Jurisdiction - Habeas Corpus

Hoyt Weaver, in proper person, Avon Park, Florida,

for Petitioner

Jim Smith, Attorney General; and Wallace E. Allbritton, Assistant Attorney General, Tallahassee, Florida,

for Respondent

Supreme Court of Florida
Tallahassee 32304

SID J. WHITE
CLERK
BERNICE L. SMILGIN
CHIEF DEPUTY CLERK

TELEPHONE:
904-488-0125

June 25, 1979

Honorable Jim Smith
Attorney General
The Capitol
Tallahassee, Florida 32304

Re: HOYT WEAVER v. ROBERT GRAHAM, Governor
CASE NO. 56,707

Dear General Smith:

Please find enclosed herewith original and copy of Order to Show Cause issued in the above cause. Please endorse acceptance of service on the original and return same to this office.

Thank you for your cooperation in this matter.

Most cordially,

Sid J. White
Clerk Supreme Court

SJW:dec
Enclosures
cc: Mr. Hoyt Weaver

Supreme Court, U. S.
FILED
JUN 16 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5780

HOYT WEAVER, PETITIONER

v.

ROBERT GRAHAM,
GOVERNOR OF FLORIDA, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 13, 1979
CERTIORARI GRANTED MARCH 17, 1980

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ORDER OF THE SUPREME COURT OF THE UNITED STATES GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI	24a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

4/26/79	Petition for Writ of Habeas Corpus
6/25/79	ORDER TO SHOW CAUSE ISSUED; respondent's response due 7/10/79; petitioner's reply due 7/20/79.
7/9/79	Respondent's response
7/19/79	Petitioner's reply to response of respondent.
10/5/79	Motion to file brief as amicus curiae
10/10/79	ORDER denying Amicus Curiae
11/1/79	OPINION (per curiam) Writ of Habeas Corpus denied.
3/24/80	Certified copy of Order of the U.S. Supreme Court granting the petition for certiorari

IN THE SUPREME COURT OF FLORIDA

HOYT WEAVER, PETITIONER

v

ROBERT GRAHAM, GOVERNOR,
RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS
Filed April 5, 1979

Comes now Hoyt Weaver, the above named Petitioner, and makes known to the Court that Robert Graham, Governor of the State of Florida is presently enforcing a Statute in an unconstitutional and ex-post facto manner. The premises being more fully enumerated as follows:

1. Florida Legislature enacted Florida Statute 944.275 and its effective date was fixed at January 1, 1979.

2. Petitioner was convicted of the offense of second degree murder the 13th day of May, 1976, in the Circuit Court for Hillsboro County, Florida.

3. At the time of the offense the Statutory "good time" Law of Florida gave to Petitioner 5 days per month for each of the first 2 years, 10 days per month for each of the second 2 years and 15 days per month for every year thereafter; and such "good time" was calculated as part of the sentence imposed. (F.S.944.27)

4. On January 1st., 1979, the new "good time" law was applied to Petitioner in a manner clearly detrimental in that said Statute 944.275 gives to Petitioner 3 days per month for the first 2 years, 6 days per month for the 2nd 2 years and 9 days per month for each additional year.

5. Respondent has, thereby, taken away from Petitioner 2 days per month "statutory good time" for the first 2 years of his sentence, 4 days per month for the 2nd 2 years and 6 days per month for every year there after; under a statute enacted after the offense was commited and punishment imposed.

6. Article 1 sec. 8 United States Constitution forbids any ex-post facto law.

7. Florida Constitution Article 1 prohibits any ex-post facto law.

8. Florida Constitution Article 10 sec. 9 forbids the Florida legislature enacting any statute "affecting the prosecution or punishment" for any offense previously committed.

9. Petitioner's sentence was imposed, and statutory good time was considered under chap. 33.11 F.S. and any other method of computation of statutory good time than the method in effect at the time Petitioner was prosecuted and punishment imposed is illegal, unconstitutional, and respondent, as a licensed practicing attorney is liable for his actions.

WHEREFORE, Petitioner moves that a Writ of Habeas Corpus issue out of this Court ordering, directing and commanding that respondent promptly discharge Petitioner from custody; or in the alternate that he show cause why the writ should not issue.

Respectfully Submitted,

/s/ HOYT WEAVER

(pro se)

053366
I Box 1514
P.O. Box 1100
Avon Park, Fla.

AFFIDAVIT OF INSOLVENCY

Being duly sworn and cautioned I do swear and affirm 1) that I am a poor person unable to pay the cost of this action; 2) that this action is taken in good faith; 3) that I have a just and meritorious cause; and, that I should be allowed to proceed in Forma Pauperis. It is so prayed.

/s/ HOYT WEAVER

053366 (pro se)

(Certificate of service omitted in printing)

(Jurat omitted in printing)

IN THE SUPREME COURT OF FLORIDA

[Caption omitted in printing]

RESPONSE

COMES now respondent, by and through his undersigned attorneys, and makes this response to the order to show cause heretofore issued in the captioned proceeding on June 25, 1979 and says:

I.

Petitioner is held in custody pursuant to a commitment issued May 13, 1976, copy of which is attached as Exhibit 1.

II.

Petitioner complains that he is being deprived of "good time" by an *ex post facto* law. In essence, it is claimed that since Section 944.275, Florida Statutes, effective July 1, 1978, permits the accumulation of a lesser amount of "good time" then did its predecessor, Section 944.27, then the application of the new statute to petitioner in the computation of his gain time makes the statute an *ex post facto* law because it was not in effect at the time petitioner was convicted and sentenced. Respondent disagrees. Appellate courts throughout the country have repeatedly recognized that the allowing of gain-time is an act of grace and that a prisoner has no right to receive gain time in the absence of a legislative provision therefor. In other words, gain time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied. Please see A.G.O. 078-96, copy of which is attached as Exhibit 2. For the holding of other appellate courts on this issue, please see: *Graham v. Thompson*, 246 F.2d 805 (10th Cir. 1957); *People ex rel. Kleinger v. Wilson*, 5 N.Y.S.2d 934 (S.Ct.App.Div. 3 1938); *Gilstrap v. Clemmer*, 284 F.2d 804 (4th Cir. 1960); *Kastel v. Fish*, 36 F.Supp. 700 (D.C.Md. 1931); *Estrabrook v. King*, 119 F.2d 607 (8th

Cir. 1941); *Comerford v. Commissioner of Correction*, 141 N.E.2d 893 (Mass. 1957); *Comerford v. Massachusetts*, 233 F.2d 294 (1st Cir. 1956), cert. denied 352 U.S. 899; *Lembersky v. Parole Board of Dept. of Correction*, 124 N.E.2d 521 (Mass. 1955); *People ex rel. Colletti v. Pate*, 201 N.E.2D 521 (Mass. 1955); *People ex rel. Colletti v. Pate*, 201 N.E.2d 390 (Ill. 1964); *Hiatt v. Compagna*, 178 F.2d 42 (5th Cir. 1949), aff'd 340 U.S. 880; *Shattuck v. Grider*, 493 P.2d 829 (Okla.Crim.App. 1972), citing *Dear v. Mayo*, 14 So.2d 267 (Fla. 1943), with approval.

III.

Although Section 944.275 was effective July 1, 1978, it was not implemented until January 1, 1979. This means that petitioner's gain time was computed under the provisions of Section 944.27 up until January 1, 1979 and thereafter computed pursuant to the provisions of Section 944.275. So that petitioner may have an up-to-date computation of his time and a tentative expiration date, respondent attaches the affidavit of Louie L. Wainwright showing the computation of petitioner's time and a projected release date of February 2, 1987, the same being attached as Exhibit 3.

IV.

Each and every allegation challenging the legality of petitioner's incarceration not heretofore specifically answered or denied is hereby severally denied and the contrary allegation lodged.

CONCLUSION

The petition for writ of habeas corpus should be denied.

JIM SMITH
Attorney General

By: _____

WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR RESPONDENT
The Capitol
Tallahassee, Florida 32301

(Certificate of service omitted in printing)

EXHIBIT 1 TO RESPONSE OF RESPONDENT

STATE OF FLORIDA

UNIFORM COMMITMENT TO CUSTODY OF DIVISION OF CORRECTIONS

CIRCUIT COURT CRIMINAL JUSTICE DIVISION
(Court)

HILLSBOROUGH County. SPRING Term, 19 76

Conviction for MURDER IN THE SECOND DEGREE
(Offense)

Date of conviction MAY 13th, 1976

Date of sentence imposed MAY 13th, 1976

Term of sentence FIFTEEN (15) YEARS with credit time from January 31, 1976

STATE OF FLORIDA,

Plaintiff,

vs.

Hoyt Weaver
Defendant.

O 53386

JUN 7 1976

"Case No. #76-739 B "

"WHITE MALE"

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DIVISION OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of

(Indictment) (Information)

judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the custody of the Division of Corrections of the State of Florida; and this is to command you, the said Division of Corrections, by and through your director, superintendents, wardens, and other officials, to keep and safely imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Division of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable Charles H. Scruggs, III

Judge of said Court, as also James F. Taylor, Jr.,

Clerk, and the Seal thereof, this the 13 day of May, 19 76

James F. Taylor, Jr.
Clerk of said Court

BY [illegible] D.C.

(To be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)

EXHIBIT 2 TO RESPONSE OF RESPONDENT

STATE OF FLORIDA
DEPARTMENT OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
Tallahassee, Florida 32304

JULY 18, 1978

078–96

Mr. LOUIE L. WAINWRIGHT
Secretary, Department of
Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: GAIN-TIME—PRISONERS—DEPARTMENT OF OFFENDER REHABILITATION—applicability of new gain-time formula prescribed by 1978 House Bill 811 to all inmates incarcerated on July 1, 1978. House Bill 811; § 944.27, F.S. (1977); § 944.275, F.S. (1978 Supp.).

DEAR MR. WAINWRIGHT:

This is in response to your request for an opinion on the following questions regarding 1978 House Bill 811, effective July 1, 1978:

(1) DOES HOUSE BILL 811 AFFECT ALL INMATES INCARCERATED IN THE DEPARTMENT OF OFFENDER REHABILITATION ON THAT DATE?

(2) IF THE ANSWER TO QUESTION (1) ABOVE IS NO, DOES HOUSE BILL 811 APPLY TO ALL PERSONS *SENTENCED* AFTER JULY 1, 1978, OR ONLY TO PERSONS SENTENCED FOR CRIMES *COMMITTED* AFTER JULY 1, 1978?

House Bill 811, the effective date of which is July 1, 1978, revised the formula by which gain-time may be granted to prisoners by the Department of Offender Rehabilitation. Sections 944.27, 944.271 and 944.29, F.S.

(1977), were repealed and a new § 944.275, F.S., was created to replace the repealed sections. I have found nothing in the new § 944.275, or in any section of HB 811, or in the title to the bill, indicating that the new gain-time provisions were not intended to apply to all prisoners incarcerated by the Department of Offender Rehabilitation on July 1, 1978. There is no language in the bill limiting or delaying application to those prisoners sentenced after July 1, 1978, nor is there any language limiting application to those prisoners incarcerated for crimes committed after July 1, 1978. In addition, I know of no constitutional prohibition or rule of construction which would be invoked or violated by the application of the new formula to all inmates incarcerated by the Department as of the effective date of the act (July 1, 1978). I find nothing to indicate that the statute will not operate prospectively only. Also, nothing in HB 811 imposes any additional penalty for a crime already committed, or makes more severe punishment already imposed, and nothing in the bill purports to deprive any inmate of any vested, enforceable right.

Although the courts have imposed certain procedural requirements as being necessary to guarantee due process when previously granted gain-time is to be forfeited by action of an administrative agency, such as the Department of Offender Rehabilitation, e.g., Rankin v. Wainwright, 351 F. Supp. 1306 (M.D. Fla. 1972), it seems clear that the *Legislature's* allowance of gain-time and its modification, restriction, or even abolition of gain-time is subject to the broad discretion of the Legislature. The courts have repeatedly emphasized that the allowing of gain-time is an act of grace, and that a prisoner has no right to receive gain-time absent the Legislature's exercise of its grace or discretion. Similarly, the courts have emphasized the Legislature's power to make whatever changes it deems prudent in the gain-time procedure. In *Dear* v. *Mayo*, 14 So.2d 267 (Fla. 1943), the court stated: "Parole and gained time is granted by the sovereign as a matter of *grace rather than of right*," and that "[t]he state may offer such grace under and subject to such conditions as it may con-

sider most conducive to accomplish the desired purpose." (e.s.) In *Mayo* v. *Lukers*, 53 So.2d 916, 917 (Fla. 1951), it was stated that "[t]he cases generally hold that the granting of the gain-time allowance is an act of grace rather than a vested right which may be withdrawn, modified, or denied, dependent on the course of conduct of the prisoner." And, in *Kimmons* v. *Wainwright*, 338 So.2d 239 (1 D.C.A. Fla. 1976), the court stated that "[g]ain-time is given to prisoners through the beneficence of the Legislature, and the Legislature has full authority to establish the terms and conditions thereof."

Thus, your first question is answered in the affirmative, and, accordingly, your second question need not be addressed.

SUMMARY

House Bill 811, which revises the method of granting gain-time, applies to all inmates incarcerated by the Department of Offender Rehabilitation on July 1, 1978, the effective date of the bill.

Sincerely,

/s/ _____

ROBERT L. SHEVIN
Attorney General

Prepared by:

/s/ _____

JERALD S. PRICE
Assistant Attorney General

RLS/JSP/acb

EXHIBIT 3 TO RESPONSE OF RESPONDENT

LOUIE L. WAINWRIGHT
Secretary, Department of Corrections
1311 Winewood Boulevard
Tallahassee, Florida 32301
Telephone: 904-488-5021

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF LEON

Personally appeared before me this day Louie L. Wainwright, who being duly sworn, deposes and says:

That he is the Secretary of the Department of Corrections; that as such Secretary he is the official custodian of all prisoners and the records pertaining thereto:

That Hoyt Weaver, #053366, received a 15-year sentence with credit for 103-days county jail time on May 13, 1976, in the Hillsborough County Circuit Court for the offense of Second Degree Murder;

That Mr. Weaver's sentence has been computed under provision of Section 944.27 Florida Statute, (Repealed) until January 1, 1979 and the remainder of the sentence computed under provision of Section 944.275 Florida Statute to arrive at a projected release date of February 2, 1987, calculated as follows:

Date of sentence 5/13/76	=	27892	(Days elapsed since 1900)
Sentence in days (15-years)	+	5475	
Jail Time Credit	−	103	
Statutory Gain Time earned on 1065-days served prior to 1/1/79	−	343	
Gain Time forfeited due to disciplinary reports prior to 1/1/79	+	165	
Extra Gain Time earned prior to 1/1/79	−	43	

Statutory Gain Time earned or to be earned on 2955 served or to be served from 1/1/79	–	1234
Projected release date 2/2/87	=	– 31809 (Days elapsed since 1900)

/s/ _____

LOUIE L. WAINWRIGHT, SECRETARY
Department of Corrections

(Jurat omitted in printing)

IN THE SUPREME COURT OF FLORIDA

[Caption omitted in printing]

PETITIONER'S REPLY TO RESPONSE OF RESPONDENT

Comes now the Petitioner, Hoyt Weaver, in proper person, and replies to the response of Respondent.

Petitioner would show:

1. Petitioner's filing of March 18, 1979, contended that his expiration date had been recomputed pursuant to Florida Statute 944.275 with an effective date of January 1, 1979. This claim is conceded by Respondent and is not, therefore, at issue.

2. Petitioner further contended that such application of the above cited Statute as to Petitioner constituted the enforcement of an ex post facto law by Respondent in that the criminal conduct giving rise to Petitioner's imprisonment occurred prior to the effective date of Florida Statute 944.275, and that the application of Florida Statute 944.275 as to Petitioner, is clearly detrimental to Petitioner.

3. Respondent's response is apparently based solely on a claim that statutory gain time is an act of grace by the Legislature rather than a vested right although, by reference to Attorney General Opinion 078-96 (Respondent's Exhibit 2), Respondent also contends ". . . . nothing in HB 811 imposes an additional penalty for a crime already committed or makes more severe punishment already imposed, and nothing in the bill purports to deprive any inmate of any vested, enforceable right." (Respondent's #2 at Page 2).

4. Both claims by Respondent are without merit. At the time Petitioner entered the Florida Prison System Petitioner did acquire a vested right to the expiration date established for his sentence pursuant to Florida Statute 944.27, the gain time law in effect at the time of the criminal conduct for which he stood convicted. This Statute, when applied to Petitioner's sentence, did specify, with

particularity, a date certain when Petitioner's actual imprisonment would terminate and conditional release would begin. His gain time pursuant to 944.27 was awarded to him in advance and could be taken or forfeited only for certain breeches of prison rules or the law and only in the presence of certain procedural safeguards. This date has now been altered pursuant to Florida Statute 944.275 to Petitioner's disadvantage. Relief is mandated by the following U.S. Supreme Court and Florida Supreme Court Cases:

1. Calder v Bull, 3 US (3 Dall) 386, 390, 1 L Ed 648 (1798)
2. Cummins v Missouri, 4 Wall 277, 18 L Ed 356, 71 US 277 (1866)
3. Kring v Missouri, 107 US 221, 2 S Ct. 443, 27 L Ed 506 (1882)
4. In re Medley, 134 US 160, 10 S Ct. 384, 33 L Ed 835 (1890)
5. Duncan v Missouri, 152 US 377, 14 S Ct. 570, 38 L Ed 485 (1894)
6. Thompson v. Utah, 170 US 343, 18 S Ct. 620, 42 L Ed 1061 (1898)
7. Malloy v S Carolina, 237 US 180, 35 S Ct. 507, 59 L Ed 905 (1915)
8. Lindsey v Washington, 301 US 397, 57 S Ct. 797, 81 L Ed 1182 (1937)
9. Higginbottom v St., 88 Fla 26, 101 So 233 (Fla 1924)
10. Wilensky v Fields, 267 So 2d 1 (Fla 1972)

5. Documents unavailable to Petitioner at the time of the original filing demonstrates the effect of this application. Petitioner's Exhibit A, reflecting a T.E.D. of December 31, 1984, and Respondent's Exhibit 3 (Petitioner's Exhibit B), reflecting a T.E.D., *because of the recomputation* pursuant to Florida Statue 944.275, of February 2, 1987.

6. A fuller and more complete analysis of Respondent's legal argument demonstrating the absence of merit and reflecting unequivocally that Petitioner is entitled to the relief sought is appended hereto (Petitioner's Exhibit C)

and is "Petitioner's Reply", absent Petitioner's exhibits, filed in *William P. Besser v Robert Graham, Case No. 57,021*, which argument, with all other law and argument submitted by Petitioner Besser, Petitioner would respectfully incorporate by reference. (See sections I–V, pp 2–7, Exhibit C, excluding facts applicable solely to Petitioner Besser.)

WHEREFORE, on the basis of the foregoing and attached Petitioner has demonstrated:

1. That when Petitioner entered the Florida Prison System, the Department of Corrections, applying Florida Statute 944.27, established a date certain for Petitioner's release from actual imprisonment on conditional release;

2. That due to the retroactive application of Florida Statute 944.275, as to Petitioner by Respondent, this date certain has been changed to Petitioner's disadvantage; and,

3. Such application by Respondent of Florida Statute 944.275 as to Petitioner is in direct violation of the Florida Constitution: Article I, Section 10; Article X, Section 9; and The United States Constitution Article I, Sections 9 and 10.

The Writ should issue.

Respectfully submitted,

HOYT WEAVER #053366 (pro se)
P.O. Box 1100, Slot 1514
Avon Park, Florida 33825

(Certificate of service omitted in printing)

EXHIBIT A TO REPLY OF PETITIONER

FLORIDA PAROLE AND PROBATION COMMISSION
OBJECTIVE PAROLE GUIDELINES WORKSHEET

Inmate Number: 053366 Inmate Name: Hoyt Weaver

TED: 12-31-84 Institution: Avon Park CI Date of Interview: 3-7-79

ITEM A

Number of All Prior Convictions
Three or more prior convictions=2
One or two prior convictions=1
No prior convictions (adult or juvenile)=0

2

ITEM B

Number of Prior Incarcerations
Two or more prior incarcerations=2
One prior incarceration=1
No prior incarcerations=0

2

ITEM C

Total Time Served in Years
Two or more years served=2
Up to two years served=1
No time previously served=0

2

ITEM D

Age of First Commitment (Adult or Juvenile)
17 years or younger=2
18 - 25 years =1
26 years or older=0

1

ITEM E

Number of Prior Parole Revocations or MCR Revocations
One or more prior revocations=1
No prior revocations=0

1

ITEM F

Number of Prior Escapes=1
No prior escapes=0

0

ITEM G

Burglary as Present Offense of Conviction
Present offense involves burglary=1
Otherwise=0

0

TOTAL SCORE 8

OFFENSE CHARACTERISTIC: 2nd degree murder - Greatest (Most Serious)

Matrix Time Range 78-120
Recommended Time 120

5-13-76
Start 1-31-76
County Jail Credit 103 (days)
Time Since Sentence 33 M 22d (mn. & days)
Total Time Served 37M 44d(mo. & days)

AGGRAVATING/MITIGATING CIRCUMSTANCES (Circle as appropriate; Insert Code No., Category and Explanation)

36
1
37
24
9
33

illegible

INMATE OR EXAMINER CONTEST OF SCORING: (Explain in detail)

RECOMMENDED PRESUMPTIVE PAROLE RELEASE DATE: 1-31-86

ACKNOWLEDGEMENT OF INTERVIEW:

/s/ Hoyt Weaver 1-31-76 /s/ signature illegible
Inmate Signature 10 Examiner

/s/ signature, illegible 1-31-86
Dept. of Corrections Representative Examiner

Form A: 1 Copy to Inmate
1 Copy to institution file
1 Copy with Form B to Central Office Work Processing

[THE INFORMATION ON THIS FORM HAS BEEN TRANSCRIBED FROM LONGHAND]

Exhibit B to the Reply of Petitioner is identical to the second page of Exhibit 3 to the Response of the Respondent, reproduced, *supra*, at pp. 12a–13a, and is omitted here.

Exhibit C to the Reply of Petitioner is essentially an argument of law and is omitted here.

SUPREME COURT OF FLORIDA

No. 56,707

HOYT WEAVER, PETITIONER,

v.

ROBERT GRAHAM, GOVERNOR, RESPONDENT.

[November 1, 1979]

PER CURIAM.

The petition for writ of habeas corpus is denied. *See Harris v. Wainwright*, Case No. 56,716 (Fla. Nov. 1, 1979).

ADKINS, Acting Chief Justice, BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., Concur

Original Jurisdiction—Habeas Corpus

Hoyt Weaver, in proper person, Avon Park, Florida, for Petitioner

Jim Smith, Attorney General; and Wallace E. Allbritton, Assistant Attorney General, Tallahassee, Florida, for Respondent

SUPREME COURT OF FLORIDA

No. 56,716

HENNARD HARRIS, PETITIONER,

v.

LOUIE L. WAINWRIGHT, RESPONDENT.

[November 1, 1973]

ADKINS, Acting Chief Justice.

In original habeas corpus proceedings, petitioner asserts that section 944.275 Florida Statutes (1978 Supplement) is unconstitutional as it is applied to him, in that he is harmfully required to remain in prison for an indeterminate number of months or years past the original expiration of the sentence under the law as it existed at the time of the offense. This statute, known as the "gain time statute" requires the Department of Corrections to grant deduction for gain time on a monthly basis, as earned, from the sentence of every prisoner who has committed no infraction of the rules of the department or of the laws of the state and who has performed in a satisfactory and acceptable manner the work, duties, and tasks assigned.

Petitioner says that under the former law, section 944.27 Florida Statues (1977) he was credited with all of his statutory gain time in advance at the time he was received into the custody of the Department of Corrections.

The new law (1978) is different from the former law (1977) in that there is an award of three days per month instead of five for the first two years; the award of six days per month instead of ten for the second two years; and the award of nine days per month instead of fifteen for anything over four years service of sentence.

Instead of awarding or crediting a prisoner with the statutory gain time at the old rate according to the

number of years sentenced and time served, the Department of Corrections would credit such gain time monthly (rather than in advance) at the new lesser rate and then only according to the number of years served. The "up front" awarding of gain time under the prior law was merely an administrative method by which an expiration date of sentence was tentatively calculated. Under either the old law or the new, gain time, whether it be what is normally considered "statutory" or "extra", only comes into play if a given inmate conducts himself in such a way as to deserve the gain time. Therefore, any notion of gain time can only be considered, at best, as conditionally vested.

Petitioner says that the statutory gain time credited in advance by the Department of Corrections under section 944.27, Florida Statutes (1977) was the custom by departmental rule and thus has become a vested right, at least insofar as petitioner is concerned. He says that the department entered into a binding contractual arrangement when petitioner entered prison that he would be able to receive and keep the statutory gain time in the absence of disciplinary problems. Petitioner contends that he is being deprived of "good time" by an ex post facto law. In essence, it is claimed that since section 944.275, Florida Statutes (1978) permits the accumulation of a lesser amount of good time than did its predecessor, section 944.27, Florida Statutes (1977), then the application of the new statute to petitioner and the computation of his gain time makes the statute an ex post facto law as it was not in effect at the time petitioner was convicted and sentenced.

Appellate courts throughout the country have repeatedly recognized that the allowing of gain time is an act of grace and that a prisoner has no right to receive gain time in the absence of a legislative provision therefor. In other words, gain time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied. *See Gilstrap v. Clemmer*, 284 F.2d 804 (4th Cir. 1960; *Hiatt v. Compagna*, 178 F.2d 42 (5th Cir. 1949) *aff'd.* 340 U.S. 880 (1950); *Estrabrook v. King*, 119 F.2d

607 (8th Cir. 1941); *Kastel v. Fish*, 36 F. Supp. 700 (D.C. Md. 1931); *Shattuck v. Grider*, 493 P.2d 829 (Okla.Crim.App. 1972) citing with approval *Dear v. Mayo*, 153 Fla. 114, 14 So.2d 267 (Fla. 1943); *People ex rel. Coletti v. Pate*, 201 N.E.2d 390 (Ill. 1964); *Comerford v. Commissioner of Correction*, 141 N.E.2d 893 (Mass. 1957); *Lembersky v. Parole Board of Department of Correction*, 124 N.E.2d 521 (Mass. 1934).

Although section 944.275, Florida Statutes, was effective July 1, 1978, it was not implemented until January 1, 1979. This means that petitioner's gain time was computed under the provision of section 944.27, Florida Statutes (1977), until January 1, 1979, and thereafter computed pursuant to the provision of section 944.275, Florida Statutes (1978).

Mayo v. Lukera, 53 So.2d 916 (Fla. 1951) recognizes that the right to gain time is not a vested one and that it is obviously dependent on the course of the conduct of the inmate. This Court has emphasized the legislature's power to make whatever changes it deems prudent in the gain time procedure. In *Dear v. Mayo*, 153 Fla. 164, 14 So.2d 267 (Fla. 1943), this Court said that parole and gain time is granted by the sovereign as a matter of grace rather than of right and that the state may offer such grace under and subject to such conditions as it may consider most conducive to accomplish the desired purpose. In *Kimmons v. Wainwright*, 338 So.2d 239 (1st DCA 1976), the court said that gain time is given to prisoners through the beneficience of the legislature, and the legislature has full authority to establish the terms and conditions thereof.

This is not a situation in which a new law has been passed eliminating the allowance of gain time in certain situations. *Dowd v. Sims*, 229 Ind. 54, 95 N.E.2d 628 (Ind. 1950). This is not a situation in which the entire scheme of criminal penalties has been revised. *Goldsworthy v. Hannifin*, 86 Nev. 252, 468 P.2d 350 (Nev. 1970). It is not a situation in which the length of incarceration for juvenile offenders has been extended. *In re Dowing*, 564 P.2d 375 (Cal. 1977); *In re Valenzuela*, 79 Cal. Retr. 760, 275 Cal.

App.2d 483 (3d Dist. 1969). Likewise, it is not a situation involving a new and different interpretation of existing law. *Love v. Fitzharris*, 460 F.2d 382 (9th Cir. 1972).

The petition for writ of habeas corpus is denied.

It is so ordered.

BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., Concurring

Original Jurisdiction—Habeas Corpus

Bannard Harris, in proper person, Raiford, Florida,
for Petitioner

Jim Smith, Attorney General, and A.S. Johnston, Assistant Attorney General, Tallahassee, Florida,
for Respondent

Supreme Court of the United States

No. 79-5780

HOYT WEAVER, PETITIONER,

v.

ROBERT GRAHAM, Governor of Florida

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Florida.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 17, 1980

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SUPREME COURT, U.S.

IN THE UNITED STATES SUPREME COURT

HOYT WEAVER,

Petitioner,

-v- CASE NO. 79-5780

ROBERT GRAHAM, Governor,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Florida denying petitioner's petition for writ of habeas corpus was handed down on November 1, 1979 and is reported at 376 So.2d 855.

JURISDICTION

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code, § 1257(3), or any other provision thereof, at least for the purpose of determining whether to decline assumption thereof.

QUESTION PRESENTED

WHETHER SECTION 944.275, FLORIDA STATUTES, AS APPLIED TO PETITIONER, IS AN EX POST FACTO LAW.

PRELIMINARY STATEMENT

Respondent believes that the appendix submitted by petitioner is adequate for the purposes of this certiorari proceeding. References thereto will be made by the symbol "A" followed by appropriate page number. Any other references will be specifically designated.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This proceeding involves Article I, Section 10, Florida Constitution, 1968, and Article I, Section 9, United States Constitution. The validity of Section 944.275, Florida Statutes, is at issue.

ARGUMENT

WHETHER SECTION 944.275, FLORIDA STATUTES, AS APPLIED TO PETITIONER, IS AN EX POST FACTO LAW.

Petitioner complains that he is being deprived of gain-time by an ex post facto law. In essence, it is claimed that since Section 944.275, Florida Statutes, effective July 1, 1978, permits the accumulation of a lesser amount of gain-time or "good time" than did its predecessor, Section 944.27, the application of the new statute to petitioner in the computation of his gain-time makes the statute an ex post facto law because it was not in effect at the time petitioner was convicted and sentenced. Respondent disagrees. This precise issue has been rejected by the Florida Supreme Court. See Harris v. Wainwright, 376 So.2d 855 (Fla. 1979).

It is appropriate to begin the discussion on this issue by pointing out that petitioner is incarcerated pursuant to a lawful judgment and sentence which he does not attack. See United States v. Addonizio, _____ U.S. _____, 60 L.Ed.2d 805, 99 S.Ct. _____ (1979); Banks v. State, 342 So.2d 469 (Fla. 1976).

The matter of parole prior to 1940 was within the exclusive control of the executive branch of government which exercised that power through a state board of pardons. Singleton v. State, 21 So. 21 (Fla. 1897); State ex rel. Morenco v. Mayo, 175 So. 806 (Fla. 1937). Article XVI,

§32, Florida Constitution (1885), was adopted through constitutional amendment in 1940 and is substantially similar to Article IV, §8(c), Florida Constitution (1968). See 26 F.S.A. Art. IV, §8(c), Fla.Const. (1968), p. 121. Thus, prior to 1940, there was no constitutional authorization for the legislative creation of a parole and probation commission. In addition, given the constitutional amendment in 1940 and revision in 1968, the provisions for legislative creation of a parole and probation commission were housed within the executive articles of the Constitution, emphasizing the executive nature and origin of parole. Today, the State Board of Pardons, which is an arm of the executive, is the exclusive grantor of "conditional paroles" or "pardons," Beal v. Mayo, 70 So. 2d 367 (Fla. 1954), and executive clemency. Sullivan v. Askew, 348 So.2d 312 (Fla. 1977), cert. denied 434 U.S. 878 (1977).

In emphasizing the executive nature of parole, the courts have rejected legislation imposing duties upon or granting powers to the Board of Pardons prior to the adoption in 1940 of Art. XVI, §32, Fla.Const. (1885), for unconstitutionally infringing upon the executive discretion of said Board which, inter alia, then granted paroles. Ex Parte White, 131 Fla. 83, 178 So. 876 (1938).

Moreover, in Marsh v. Garwood, 65 So.2d 15 (Fla. 1953), the Florida Supreme Court stated that the judiciary was without authority to exercise parole powers "for that is strictly a function of the executive branch of the government to be exercised only after the defendant has been convicted and sentenced and hence after the judicial labor has come to an end." Marsh v. Garwood, 65 So.2d at 21. Dye v. United States Parole Commission, 558 F.2d 1376 (10th Cir. 1977); Wright v. State, 342 So.2d 565 (Fla.App. 1 1977); Cf.

Brest v. Ciccone, 371 F.2d 981, 982-983, (8th Cir. 1967). Thus, until 1940, the exercise of parole powers was inextricably and exclusively wed with the exercise of the power of pardon which has been exercised from time immemorial by the executive and could not and still cannot be infringed upon by the Legislature. Singleton v. State, supra. See also, In Re Advisory Opinion to Governor, 64 Fla. 21, 59 So. 786 (1912).

The purpose of tracing the early legal history of the Parole and Probation Commission is to establish that prior to the adoption of Art.XVI, §32,Fla.Const. (1885), in 1940, the power to grant or deny parole was part and parcel of the power of pardon which is an exclusive power of the executive branch of government, in that such powers were exclusively exercised by the State Board of Pardons which continues today to exclusively exercise all powers of executive clemency without legislative restraint. Sullivan v. Askew, supra. Finally, it is respondent's position that Art.IV, §8(c), Fla.Const. (1968), does not vest parole powers in the legislative branch of government, does not change the executive nature of parole, does not place the Commission under the constitutional control of the Legislature, and does not permit the Legislature to restrict, impede, qualify, intecede upon, tamper with, or overrule the Commission in the exercise of its parole powers. Art.IV, §8(c), Fla.Const. (1968) serves only to authorize the legislative creation of a Parole and Probation Commission which is then empowered by the Constitution, not by statute, "to supervise persons on probation and to grant paroles or conditional releases to persons under sentences for crime." If the Legislature had merely passed legislation creating such a Commission and had failed to statutorily provide or prescribe the powers and duties of the Commission, it would nonetheless possess and be able to exercise those powers set forth in the aforecited

constitutional provision for, although that provision is not self-enacting in regard to creation, once creation is effected, the powers of the Commission flow automatically and without restraint from the Constitution which is their genesis. Thus, although the Commission is created by legislative action, it nonetheless exercises powers exclusive to the executive branch. The Legislature is therefore barred by the doctrine of separation of powers from interfering in any manner with the exercise of those executive powers. Cf. Sullivan v. Askew, supra; Advisory Opinion Of The Governor, In Re Administrative Procedure Act: Executive Clemency, 334 So.2d 561 (Fla. 1976); In Re Advisory Opinion Of The Governor Civil Rights, 306 So.2d 520 (Fla. 1975); Singleton v. State, supra; Art.II, §3, Fla.Const. (1968).

Based upon the foregoing, and under Florida law, there is no right to parole; it is a matter of grace, not of right. Dear v. Mayo, 14 So.2d 267. See Greenholtz v. Inmates of the Nebraska Penal Complex, _____ U.S._____, 60 L.Ed.2d 668, 675, 99 S.Ct. 2100 (1979); Brown v. Lundgren, 528 F.2d 1050, 1052-53 (5th Cir. 1976); Lashley v. State of Florida, 413 F.Supp. 850 (M.D. Fla. 1976). In addition, in United States v. Addonizio, supra, the Court stated:

> To require the Parole Commission to act in accordance with judicial expectations, and to use collateral attack as a mechanism for ensuring that these expectations are carried out, would substantially undermine the congressional decision to entrust release determinations to the Commission and not the courts. . . .

Id. at 814. Cf. Brest v. Ciccone, supra.

It is respondent's position that petitioner does not possess any "right" to parole nor to the "accumulation of gain-time" protected by the United States or Florida Constitutions. This is so because neither Constitution protects that which it does not guarantee. Consequently, petitioner's argument is without merit. Greenholtz, supra, 60 L.Ed.2d at 677; Brown v. Lundgren, 528 F.2d 1050, 1053 (5th Cir. 1976); McIntosh v. Woodward, 514 F.2d 95 (5th Cir. 1975). For example, in Greenholtz, this Court remarked:

> There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." Meachum v Fano, 427 US 215, 224, 49 L Ed 2d 451, 96 S Ct 2532 (1977).

60 L.Ed.2d at 675.

Appellate courts throughout the country have repeatedly recognized that the allowing of gain-time is an act of grace and that a prisoner has no right to receive gain-time in the absence of a legislative provision therefor. In other words, gain-time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied. Graham v. Thompson, 246 F.2d 805 (10th Cir. 1957); People ex rel. Kleinger v. Wilson, 5 N.Y.S.2d 934 (S.Ct.App.Div. 3 1938); Gilstrap v. Clemmer, 284 F.2d 804 (4th Cir. 1960); Kastel v. Fish, 36 F.Supp. 700 (D.C.Md. 1931); Estrabrook v. King, 119 F.2d 607 (8th Cir. 1941); Comerford v. Commissioner of Correction, 141 N.E.2d 893 (Mass. 1957); Comerford v. Massachusetts, 233 F.2d 294 (1st Cir. 1956), cert. denied 352 U.S. 899; Lembersky v. Parole Board of Dept. of Correction, 124 N.E.2d 521 (Mass. 1955); People ex rel.

Colletti v. Pate, 201 N.E.2d 390 (Ill. 1964); Hiatt v. Compagna, 178 F.2d 42 (5th Cir. 1949), aff'd 340 U.S. 880; Shattuck v. Grider, 493 P.2d 829 (Okla.Crim.App. 1972), citing Dear v. Mayo, 14 So.2d 267 (Fla. 1943), with approval. The decision of the Louisiana Supreme Court in State v. Curtis, 363 So.2d 1375 (La. 1978), is clearly distinguishable from the issue presented sub judice. In Curtis, the court pointed out that the statute there under attack applied "a new punitive measure to a crime already consummated to the detriment or material disadvantage of the wrongdoer." The statute here under attack, Section 944.275, Florida Statutes, has no relation to sentencing and does not apply any punitive measure to a crime already consummated to petitioner's detriment or material disadvantage. Particularly is this true when viewed in the context of Florida's law which has long held that the granting or parole and allowance of gain-time is a matter of grace rather than a vested right and may be withdrawn, modified, or denied. Mayo v. Lukers, 53 So.2d 916 (Fla. 1951); Kimmons v. Wainwright, 338 So.2d 239 (Fla.App. 1 1976).

CONCLUSION

The petition for writ of certiorari should be denied.

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IN THE SUPREME COURT OF THE UNITED STATES

HOYT WEAVER,
PETITIONER

-VS-

ROBERT GRAHAM,
GOVERNOR OF FLORIDA,
RESPONDENT

CASE NO. 79-5780

TRAVERSE TO RESPONDENT'S BRIEF

OR; IN THE ALTERNATE

MOTION TO STRIKE

- I -

Article II, Section 9, relative to the powers of the Congress of the United States

> "No bill of attainder or ex post facto law shall be passed."

In Article II, Section 10, The Constitution of The United States holds that "No state shall.....pass any bill of attainder, ex post facto law or law impairing the right of contracts....."

Petitioner would first show that the question before this Court, as before the Florida Supreme Court, goes solely to Section (1) of Florida Statute 944.275 reducing gain time for good behavior as is reflected by the record. The Response does not so designate the question (Response page one). Likewise, the Response overlooks Article II, Section 10 of the United States Constitution cited above and in the original petition. Finally, as the record reflects, Respondent may not claim that the validity of 944.275 (1) is at issue in that Petitioner has made no such claim; - merely that it may not be applied to Petitioner.

- II -

Respondent, for some reason of his own, argues only that the Florida Parole Commission is a Constitutional Agency. Such has absolutely no bearing upon the issues presented here unless Respondent is trying to mislead the Court into believing that Parole and Statutory Gain Time are the same.

- III -

Parole is granted by a Parole Commission. Parole is not required and any prisoner may decline a parole since parole is in the nature of a legal contract and need not be accepted.

Statutory Gain Time is aimed solely and completely at Mandatory Conditional Release which is a matter of law and must be accepted. A prisoner may not refuse it.

Parole and Mandatory Conditional Release are neither interdependent nor connected in any matter whatsoever, whatever the basis of parole, be it Legislative or Executive. Moreover, parole is not here at issue and bears absolutely no weight in the present matter.

Statutory Gain Time is a creature of the Legislature and must be given when earned. It may not be withheld except for infractions of the Prison Rules. Even then, it may only be taken in amounts fixed by law and a Disiplinary Report and Hearing is indispensible for its taking.

For these reasons, Court need not inquire as to the Florida Parole System since it is not here at issue so it matters not at all whether the Parole System of Florida is Executive or Legislative and that part of the Response should be stricken as irrelevant, immaterial and frivolous.

- IV -

The question before this Court:

> Where a Statute is enacted after the commission of an offense which materially alters the situation of the accused to his material disadvantage is the application of such Statute to the accused ex post facto?

It is necessary only to consider the following:

> The offense in the instant case occurred in 1976. The effective Statute (944.27) at that date:
> (1) The Department of Offender Rehabilitation shall grant the following deductions for gain time...
> (A) 5 days per month off the first and second years of the sentence;
> (B) 10 days per month off the third and fourth years of the sentence; and
> (C) 15 days per month off the fifth and all succeeding years of the sentence.

Petitioner was sentenced to a total of fifteen years imprisonment in 1976.

On July 1, 1978, a new Statute (944.275) was enacted:

> (1) The Department of Offender Rehabilitation shall grant the following gain time reductions...
> (A) 3 days per month off the first and second years of the sentence;
> (B) 6 days per month off the third and fourth years of the sentence; and
> (C) 9 days per month off the fifth and all succeeding years of the sentence.

Bluntly stated, the New Gain Time Law (944.275) takes away certain benefits guaranteed by 944.27 at the time of sentencing and therefore adds to the penalty contemplated by the law at time of sentencing; - and is, for that reason, ex post facto as it applies to Petitioner.

- V -

Respondent states that "Curtis is distinguishable" is either in error or is a deliberate mis-statement. Curtis holds:

> "That the law has been changed to the defendant's disadvantage, after commission of the crime, is unquestioned. The pertinent inquiry is whether this type of change, of substantial consequence, is the type of retroactive law which is banned by the ex post facto clause." State v. Curtis, 363 So.2d 1375 at 1379.

Clearly, both Curtis, and instant petition deal with the application of statutory law enacted after commission of the crime, altering the punishment contemplated by law at the time of the commission of the crime. Thus, Curtis, like the other Louisiana cases cited, is on point and should be considered.

Moreover, Respondent's reliance on Greenholtz v Inmates of the Nebraska Penal Complex, ____US____, 99 S Ct 2100, 60 L Ed 2d 668 (1979) is misplaced. In Greenholtz 99 S Ct at 2106 the position of the Court in Wolff v. McDonnell, 418 US 539, 94 S Ct 2963, 41 L Ed 2d 935 (1974) protecting gain time for good behavior was affirmed. Here we deal with just such statutory gain time for good behavior (Florida Statute 944.27) not parole, the subject matter of Greenholtz.

We are not at all concerned with Parole, Parole Commissions, or what branch of the State Government controls, although since Respondent attempted to argue that the Parole Commission of

Florida is constitutionally fixed in the Executive, it is here required that Petitioner point out that the provision governing such Parole Commission and paroles, Article IV 8 (c), Florida Constitution, states only:

> (c) There may be created by law a parole and probation commission with power to supervise persons on probation and to grant paroles...(emphasis supplied)

and Respondent is appearing to present the untenable position that the Executive Branch of the Florida Governement can now create laws.

- VI -

The Response is wholly unresponsive in that it does not even touch on the matter here at issue. The Response merely presents a rather rambling account of the history of parole in Florida and then cites cases in which gain time was taken for violations of the rules or conditions applicable in those distinct cases. Not one single case cited applies to the issue here.

Court may take Judicial Notice that the Response fails utterly to deny Petitioner's claim; and, therefore, may be held to agree with the position presented by Petitioner;

And, the Response should be stricken as frivolous.

The Writ should be issued.

Respectfully submitted,

Hoyt Weaver

HOYT WEAVER

CERTIFICATE OF SERVICE

I, Hoyt Weaver, did place a true copy of the foregoing Motion To Expedite and Traverse To Response in the United States Mail this 4 day of March, 1980, directed to Jim Smith, Attorney General of Florida, The Capitol, Tallahassee, Florida.

Hoyt Weaver

HOYT WEAVER

SUBSCRIBED TO AND SWORN
BEFORE ME THIS 4th DAY OF
March 1980

James G. Tilman

NOTARY PUBLIC

JAMES G. TILMAN
Notary Public, State of Fla. at Large

IN THE SUPREME COURT OF THE UNITED STATES

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HOYT WEAVER,
PETITIONER

-VS-

ROBERT GRAHAM,
GOVERNOR OF FLORIDA,
RESPONDENT

CASE NO. 79-5780

IN THE MATTER OF: PETITION FOR WRIT OF CERTIORARI

MOTION TO EXPEDITE

Comes now Hoyt Weaver, Petitioner above named, and presents this Motion to Expedite, showing cause as follows:

1. Petitioner's cause should prevail.
2. The outcome of the present cause will materially affect thousands of persons; all who were convicted of any offenses occurring prior to either July 1, 1978 (the effective date of Florida Statute 944.275) or January 1, 1979 (the date Florida's Department of Corrections decided to implement the cited Statute).
3. Thousands of Florida prisoners are being denied knowledge as to their release date.
4. Hundreds of Florida prisoners are already serving time past their expiration date under Florida Statute 944.27.
5. Every day of delay causes irreparable damage by keeping prisoners past their proper date of release.
6. The cause presents no complicated issues, but, simply stated, asks merely if Florida is permitted to apply an ex post facto law.

Respectfully submitted,

Hoyt Weaver

HOYT WEAVER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-5780

HOYT WEAVER, *Petitioner,*

v.

ROBERT GRAHAM, GOVERNOR OF FLORIDA, *Respondent.*

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5780

HOYT WEAVER, *Petitioner,*

v.

ROBERT GRAHAM, GOVERNOR OF FLORIDA, *Respondent.*

On Writ Of Certiorari To The Supreme Court of Florida

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion below, a per curiam memorandum decision, is reported at 376 So. 2d 855 (Fla. 1979). It denied relief to petitioner, relying completely upon *Harris* v. *Wainwright*, 376 So. 2d 855 (Fla. 1979), a companion case decided on the same date. Both opinions are reproduced in the appendix (A 19a-23a).

JURISDICTION

The judgment of the Supreme Court of Florida was rendered on November 1, 1979. No petition for rehearing was filed. The petition for writ of certiorari was filed *pro se* on December 13, 1979, with accompanying motion for leave to proceed *in forma pauperis*. The petition was granted as to question one on March 17, 1980, as was the motion for leave to proceed *in forma pauperis*. On further motion of petitioner, counsel was apponted on April 28, 1980. The jurisdiction of this Court rests upon 28 U.S.C. §§ 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following federal constitutional provision is involved:

> No State shall . . . pass any . . . ex post facto law. U.S. Const. art. I, §§ 10, cl.1

Several Florida Statutes, notably Section 944.27 (1975) and Section 944.275 (1979), are involved. The pertinent portions are set forth in the Statement of the Case, *infra*, and the complete provisions are reproduced in an appendix to this brief.

QUESTION PRESENTED

Question one presented by the petition is rephrased more precisely as follows (Rule 40(2), Rules of the Supreme Court of the United States [1970 version]):[1]

> Whether a state statutory amendment reducing substantially the right to acquire gain time conditioned only upon good conduct violates the *ex post facto* prohibition of the federal Constitution as applied to a prisioner who had been convicted of an offense occurring prior to the effective date of the amendment and who had been acquiring gain time under the significantly more beneficial provisions of the former statute.

STATEMENT OF THE CASE

Procedural History

The petitioner was convicted on May 13, 1976, in a Florida state court of second degree murder allegedly occurring on January 31, 1976[2], and was sentenced to a

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[1] The petition phrased the question in this manner:

> "Where a statute is enacted after the commission of an offense which materially alters the situation of the accused to his material disadvantage is the application of such statute to the accused ex post facto?"

[2] The date of the offense is established in the record below by resort to the date of arrest shown in the commitment order of the trial court (A 8a). This date has been verified by counsel by comparison with the original criminal information filed February 17, 1976, *State of Florida* v. *Weaver,* Case No. 76-739B, Circuit Court of Hillsborough County, Florida. The same trial court file reflects that petitioner in fact pleded guilty to the charge pursuant to plea negotiations with the prosecutor. (Judgment entered May 13, 1976 and transcript of sentencing proceedings of May 13, 1976 (filed August 12, 1977), pages 2-3, and 11.)

term of imprisonment of 15 years less credit for prior jail time (A 8a).

Under Florida statutory law as it existed on both January 31 and May 13, 1976, opportunity to acquire "gain time for good conduct" was available to petitioner Fla. Stat. §§944.27 (1975).[3] The pertinent portions of this statute (hereafter the first statute) are:

> "944.27 Gain time for good conduct; . . .
>
> (1) The division shall grant the following deductions for gain time from the sentences of every prisoner who has committed no infraction of the rules or regulations of the division, or of the laws of the state, and who has performed in a faithful, diligent, industrious, orderly and peaceful manner, the work, duties and tasks assigned to him, to wit:
>
> (a) Five days per month off the first and second years of his sentence;
>
> (b) Ten days per month off the third and fourth years of his sentence; and
>
> (c) Fifteen days per month off the fifth and all succeeding years of his sentence; and he shall be entitled to credit for a month as soon as he has served such time as, when added to the deduction allowable, would equal a month."

By enactment of Chatper 78-304, Laws of Florida, the Florida Legislature repealed Section 944.27 and

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[3] The principal Florida statutes and session laws cited are reproduced in their entirety at the end of this brief. The Florida term of "gain time" is utilized herein, but it should be noted that in many jurisdictions the term "good time" is employed. In common parlance both are known as "time off for good behavior."

enacted Section 944.275, Florida Statutes (1979), ostensibly effective July 1, 1978. This repealing act contained no savings clause. The new statute (hereafter "the second statute") in pertinient part provides:

> "944.275 Gain time; . . .
>
> (1) The department shall grant the following deductions for gain time on a monthly basis, as earned, from the sentence of every prisoner who has committed no infraction of the rules of the department or of the laws of the state and who has performed in a satisfactory and acceptable manner the work, duties and tasks assigned, as follows:
>
> (a) Three days per month off the first and second years of the sentence;
>
> (b) Six days per month off the third and fourth years of the sentence;
>
> (c) Nine days per month off the fifth and all succeeding years of the sentence; and the prisoner shall be entitled to credit for a month as soon as the prisoner has served such time as, when added to the deduction allowable, would equal a month."

The second statute in the subsection pertinent to this case differs from the first in adopting a requirement that gain time be granted "on a monthly basis, as earned," and substituting a requirement that "work, duties and tasks assigned" be "performed in a satisfactory and acceptable manner" for the former requirement that such be "performed in a faithful, diligent, industrious, orderly and peaceful manner." The monthly earning provision is not material and was, in fact, added by still

another amendment intervening between May 13, 1976, and the second statute.[4] The linguistic changes relating to quality of work performed are of no consequence, because they either present no change or a change of a less onerous nature.[5]

The change now challenged lies in the dramatic reduction in the opportunity to acquire gain time for good conduct and thus procure a reduction in sentence. The impact on petitioner and those similarly situated[6] is vividly displayed in a tabular form depicting what amounts to a 40 percent reduction in opportunity to ac-

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[4] Chapter 76-273, Laws of Florida. Indeed it is dubious if this addition represents a change in the first statute in view of the final clause of Section 944.27(1)(c). However, it was probably intended to clarify the prior administrative practice of condititonally determining a tentative date of release on the assumption that all gain time would be earned. See *Harris* v. *Wainwright*, 376 So. 2d. 855 (Fla. 1979). (A 21a)

[5] See *Calder* v. *Bull*, 3 Dall. 386, 391 (1798).

[6] Although not a class action, this case has dramatic repercussions for numerous persons in the Florida penal system. In the year ending June 30, 1976, 4,695 persons were initially confined in the Florida penal system to serve sentences longer than three years (including petitioner); the corresponding numbers for the year ending June 30, 1977 (sentences more than two years) and the year ending June 30, 1978 (sentences more than one year) are respectively 6,228 and 7,732. (Annual Reports, State of Florida Department of Offender Rehabilitation, 1975-1976, 1976-1977 and 1977-1978). Thus, 18,654 other persons (unless released for other reasons) are subject to a greater or lesser degree to the same effects of the statute as is petitioner.

quire gain time (*e.g.*reduction of five days to three days is reduction of two days or 40 percent of five days):

	First Statute	Second Statute
Years 1 and 2	5 days per month	3 days per month
Years 3 and 4	10 days per month	6 days per month
Year 5 and thereafter	15 days per month	9 days per month

This change from "5-10-15" to "3-6-9" has the following consequences to prisoners serving these illustrative sentences:

Sentence	Sentence Less Gain Time for Good Conduct	
	First Statute	Second Statute
5 years (1825 days)	1285 days	1501 days
10 years (3650 days)	2210 days	2786 days
15 years (5475 days)	3135 days	4071 days

(Source: Gain Time Tables of State of Florida Department of Offender Rehabilitation, 1977 and 1979.)

For reasons not clear in the record (but as to which there could be no complaint here), the state continued to apply the first statute until December 31, 1978 (six months after the effective date of the second statute) and did not implement the decreased gain time schedule until January 1, 1979 (A 6a). It then was applied from that date forward to all persons such as petitioner who were then in confinement (A 12a). In so doing, the State Department of Offender Rehabilitation relied upon an opinion of the Attorney General of Florida reciting that, "I know of no constitutional prohibition . . . which would be invoked or violated by the application of the new formula to all inmates incarcerated by the Department as of the effective date of the act." (A 10a) Asserting that the statute would operate only prospectively, the Attorney General opined that he found no feature of the statute which "imposes any additional penalty for a crime already committed, or makes more severe punishment already imposed." (A 10a) The opinion fails to cite even one decision which involved the factual situation here involved.

It is undisputed that under the first statute the petitioner had an anticipated release date of December 31, 1984. (A 15a-17a) Utilizing the second statute to govern his case on and after January 1, 1979, under the detailed calculation submitted by the state he had a new projected release date of February 2, 1987, a difference of

two years, one month, and two days, approximately fourteen percent of his original sentence (A 13a).[7]

Petitioner and others similarly affected separately brought *pro se* habeas corpus proceedings directly in the Supreme Court of Florida, each raising the question of the constitutional propriety of the application to the petitioner of the decreased gain time schedule. On November 1, 1979, the Court filed its opinion in the case of *Harris* v. *Wainwright*, 376 So. 2d 855 (Fla. 1979) denying relief. That opinion was cited in the memorandum opinions in remainder of the cases, including that of petitioner.[8]

Apart from inclusion within a group of citations of one *per curiam* affirmance by an equally divided court *(Hiatt* v. *Campagna*, 340 U.S. 880 (1950)), the Supreme Court of Florida did not discuss or distinguish any holdings of this Court, although a number were cited to

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[7] Although the theoretical calculation for petitioner amounts to a slightly different time, the actual anticipated release dates cited result from other features of Florida law not here involved, such as loss of gain time for disciplinary reasons and accumulation of extra gain time (a matter of administrative discretion not here involved). However, it cannot be denied that by any calculation the difference is substantial. Thus, a fourteen percent increse is in effect a requirement to serve an eight day week for credit formerly awarded for seven.

[8] *Besser* v.*Graham*, 376 So 2d 857 (Fla. 1979); *Green* v.*Wainwright*, 376 So. 2d 857 (Fla. 1979); *Harris* v. *Wainwright*, 376 So. 2d 855 (Fla. 1979); *Weaver* v. *Graham*, 376 So. 2d 855 (Fla. 1979). At least in the case of petitioner, and apparently in the others, there was no oral argument of other hearing and none of the petitioners were represented by counsel. It should be noted that the year of the opinion date shown for *Harris* in the appendix as 1973 is an obvious error. (A 20a)

that court by petitioner (A 15a). Observing that at best "any notion of gain time can only be considered as conditionally vested," it held that "the allowing of gain time is an act of grace. . . [which] may be withdrawn, modified or denied," and that "the state may offer such grace under and subject to such conditions as it may consider most conducive to accomplish the desired purpose." 376 So. 2d at 856-857 (A 21a). Although not dealing with the issue of the dramatic alteration in the projected release dates, it commented in distinguishing other authorities, "[t]his is not a situation in which a new law has been passed *eliminating* the allowance of gain time in certain situations," and "[i]t is not a situation in which the length of incarceration for juvenile offenders has been extended." *Id.* at 857 (emphasis added). (A 21a) The relevance of these distinctions was not amplified. The Court surprisingly did not discuss its own holding in *Lee* v. *State*, 294 So. 2d 305 (Fla. 1974), *overruled on other grounds*, 340 So. 2d 474 (Fla. 1976), that a statute restricting parole could not be applied to crimes committed prior to its effective date.

The Nature of Gain Time

It is useful in the preliminary portion of this brief to examine the nature of gain time in Florida. At the time of the offense in question Florida law specified several means by which prisoners could have been released from prison prior to that time specified in a court ordered sentence. Among such procedures are pardon, parole, the earning of gain time for good conduct and the awarding of discretionary gain time. These pro-

cedures obviously differ in certain respects, some of which are significant in establishing that gain time for good conduct is an integral part of the sentence imposed upon a criminal defendant. Examination of these various alternatives not only establishes the relationship between the sentence and the earning of gain time for good conduct, but it also reveals the fallacy in the holding below that gain time for good conduct is an act of grace.

The procedural methods for obtaining pardon, parole or gain time vary greatly with regard to the administrative objectivity required in implementing each form of release. For example, the laws of Florida grant its governor, with the approval of three members of his cabinet, virtually unbridled power to grant full pardons by filing an appropriate order with the Department of State.[9] Section 940.01(1), Florida Statutes (1975). The statute tracks Article IV, Section 8(a) of the Florida Constitution which vests "sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act of grace." *See also Sullivan* v. *Askew*, 348 So. 2d 312, 315 (Fla. 1977), *cert. denied*, 434 U.S. 878 (1977).

The Constitution of the State of Florida also provides that the Legislature may create a parole and probation commission with the power to supervise persons on probation and to grant paroles or conditional releases to persons sentenced for crimes. *See Fla. Const.* Art. IV, § 8(c). Such a commission has been established

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[9] This broad statutory power is not available in cases of treason and in cases where impeachment results in conviction. *See Fla. Stat* 940.01(2) (1975).

by Chapter 947, Florida Statutes. The commission's powers and duties include determining what persons shall be placed on parole and fixing the time and conditions of parole (as provided in Chapter 947). Fla. Stat. §947.13 (1975). The granting of parole, at times relevant to this action, was within the discretion of the Parole and Probation Commission under Sections 947.13 and 947.16(2) Florida Statutes (1975).[10] *See More* v. *Florida Parole and Probation Commission,* 289 So. 2d 719, (Fla. 1974), *cert. denied,* 417 U.S. 935 (1974) (citing *Marsh* v. *Garwood,* 65 So. 2d 15 (Fla. 1953)). Chapter 947 simply guaranteed a convicted criminal falling within its guidelines the right to proper consideration for parole.[11] *See More, supra.* Therefore, the parole process was similar to the pardon process as its implementation was dependent on the exercise of discretion. The principal distinction between parole and pardon is that parole does not terminate a sentence as does a full pardon, *See Sellers* v. *Bridges,* 15 So. 2d 293, 294 (Fla. 1943). Consequently, parole may be revoked upon a breach of its terms. *Id.* at 295. *See also* Fla. Stat. §947.21 (1977).

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[10] In 1978, Florida's legislature substantially modified Chapter 947 in passing the Objective Parole Guidelines Act of 1978. *See* Fla. Laws, Ch. 78-417, §3. The express intent for this amendment was to reduce the broad discretion previously afforded the Parole and Probation Commission by establishing objective criteria for paroling inmates. *See Fla. State.* §947.002 (1)(1979). Petitioner was sentenced prior to the passage of the aforesaid Act. Therefore, the background discussion in this brief deals with the Florida statutory scheme as it existed when petitioner allegedly committed that crime for which he was subsequently sentenced.

[11] The procedures for obtaining such proper consideration are specified in Chapter 947 and include an "interview" before a hearing examiner.

In stark contrast to either parole or pardon, the award of gain time for good conduct on a monthly basis is mandated by the applicable statute for "every prisoner who has committed no infraction of the rules of the Department [of corrections] or of the laws of the State and who has performed in a faithful, diligent, industrious, orderly and peaceful manner the work, duties and tasks assigned to him . . ." *Fla. Stat.* § 944.27(1) (1975).[12] The statute establishes expressly the specific amount of gain time which shall be awarded each prisoner on a monthly basis.

This gain time for good conduct must be distinguished from extra gain time described in Section 944.271, Florida Statutes (1975). That statute provides that the appropriate department "may allow in addition to time credits, extra good time allowances for meritorious conduct or exeptional industry." *Id.* As opposed to gain time for good conduct, extra gain time is merely permitted, not mandated. This is reflected on the face of Section 944.271 as it merely authorizes, but does not require, the granting of additional gain time.

Gain time for good conduct is unique among the procedures established in Florida with regard to obtaining early release; Section 944.27, Florida Statutes (1975)

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[12] As noted previously in the first portion of the Statement of the Case, the wording of the cited statute has been altered somewhat by the same amendment which reduced the amount of statutory gain time. *See* Fla. Laws, Ch. 78-304, § 1, modified at *Fla. Stat.* § 944.275(1) (1979) (as further amended by Fla. Laws, Ch. 79-3, § 56, by deleting the words "of Offender Rehabilitation" after the word "department").

requires the automatic granting of gain time to those prisoners who have committed no infractions of the law or Department of Corrections rules and who have performed assigned work in an appropriate manner. The means of achieving this reduction are almost totally within the control of the prisoner and are not conditioned upon subjective evaluations or comparisons. Thus, they can hardly be viewed as an extension of the grace of the sovereign retractible at will.

SUMMARY OF ARGUMENT

Application to petitioner of the decreased "3-6-9" schedule specified in the second statute violates the *ex post facto* prohibition. It operates retrospectively because it is aimed at prior acts. It amounts to the improper imposition of greater punishment than that specified by statutory provisions in effect at time of the commission of the offense, *Calder* v. *Bull,* 3 Dall. 386 (1798), alters the situation of petitioner to his disadvantage, *Kring* v. *Missouri,* 107 U.S. 221 (1883) and *Lindsey* v. *Washington,* 301 U.S. 397 (1937) or imposes unpleasant consequences upon petitioner for prior conduct, *DeVeau* v. *Braisted,* 363 U.S. 144 (1960).

The decisions of this Court closest in point factually are *Scafati* v. *Greenfield,* 390 U.S. 713 (1968), *affirming* 277 F.Supp 644 (D.Mass. 1967), and *Lindsey* v. *Washington, supra,* which respectively struck down provisions retrospectively restricting gain time acquisition by parole violators and mandating a formerly permissive sentence. The great weight of decisions of lower courts in cases in point supports the petitioner.

Although inapposite, the decision below was based on a theory of "absence of vesting". That theory in fact ignores the "vested" nature of constitutional rights and the reliance placed on existing law by sentencing courts and criminal defendants.

The state urges that it has an unrestricted right to alter rules for acquiring gain time by previously sentenced prisoners. This position flouts the recognition of the right to acquire gain time as a constitutionally protected liberty interest. Moreover, if sustained, it would remove any barrier whatever to arbitrary state legislative action and would drain the *ex post facto* clause of any viability in this area.

ARGUMENT

The statutory amendment in question violated the *ex post facto* prohibition of the federal Constitution because acting retrospectively it either imposed a greater punishment than that provided by the statutory provisions in effect at the time of the commission of the offense, altered the situation of petitioner to his disadvantage or imposed unpleasant consequences upon petitioner for prior conduct.

General Principles Relating to *Ex Post Facto*

This section will review the relevant principles of law articulated by this Court, which will then be examined in the light of holdings of other tribunals and related to the present case. *Ex post facto* laws have long

been a source of distrust, 1 *Blackstone's Commentaries* *46. The prohibition against them has occupied a particularly significant posture in American constitutional concepts. The Constitution of the United States from its adoption forbade enactment of *ex post facto* laws by either Congress or by state legislatures.[13] It has been emphasized that these protections of liberty were deemed of such importance by the Framers as to precede even the proposal to the states of the Bill of Rights. *Kring* v. *Missouri*, 107 U.S. 221 (1883). Although the constitutions of several of the original states contained similar restrictive provisions, there was a strong inclination to view *ex post facto* legislation as inherently invalid. Thus, in the first *ex post facto* case reviewed by this Court, the opinion was expressed that "[t]o maintain that our federal, or state, Legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican government." *Calder* v. *Bull*, 3 Dall. 386, 388-389 (1798) (opinion of Chase, J.). The *ex post facto* prohibition was viewed, however, as a significant additional safeguard against legislative tyranny. "The prohibition against their making any *ex post facto* laws was introduced for greater caution, and very probably arose from the knowledge that the Parliament of Great Britain claimed and exercised a power to pass such laws . . . " *Id.* at 389.

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[13] "No . . . *ex post facto law* . . . shall be passed." U.S. Const. art. I, § 9, cl. 3.

"No State shall . . . pass any . . . ex post facto law." U.S. Const. art I, § 10, cl. 1.

(Hereafter the two clauses are collectively termed "the *ex post facto* prohibition" or "the ex *post facto* clause," although only the second is here involved.)

In *The Federalist* No. 44, pp. 282-283, (Kendall and Caney ed., 1965), Madison corroborated Justice Chase's opinion that the *ex post facto* prohibition only served to formalize the view that such laws were inherently invidious:

> "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. . . . They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding." *Id.* at 282-283.

It has been observed with regard to the importance to the Framers of the *ex post facto* clause:

> "So much importance did the Convention attach to it, that it is found twice in the Constitution: first as a restraint upon the power of the General Government, and afterwards as a limitation upon the legislative power of the States." *Kring* v. *Missouri*, 107 U.S. 221, 227 (1883).

To the same effect is this view expressed in *Ex Post Facto Laws in the Supreme Court of the United States*, 15 Cal. L. Rev (1927):

> "The *ex post facto* clauses, in which may be included the prohibitions against bills of attainder, are

> restraints upon legislative excesses. That it was considered necessary to include them in the original Constitution is a commentary upon the importance attributed to them by the Framers. Such matters as freedom of religion, freedom of speech, freedom of the press, etc., came later in the first ten amendments and then only as restraints upon the federal government."

From the early days of the Republic, such laws have been denounced as "oppressive, unjust and tyrannical; and, as such, . . . condemned by the universal sentence of civilized man." *Ogden* v. *Saunders*, 12 Wheat. 213, 266 (1827) (opinion of Washington, J.) *Ex post facto* laws "were thoroughly disapproved by the Framers of our government and were intended by them to be completely impossible under our system." Crosskey, *The True Meaning of the Constitutional Prohibition of Ex Post Facto Laws*, 14 U. Chi. L. Rev. 539 (1947).

From the rendering of the seminal case of *Calder* v. *Bull*, 3 Dall. 386 (1798), this Court has consistently held that the *ex post facto* prohibition is applicable only to criminal cases or to cases involving penalties or forfeitures and not to conventional civil cases. *See, e.g.*, *Carpenter* v. *Pennsylvania*, 17 How. 456 (1855); *Baltimore & Susquehanna R.R. Co.* v. *Nesbit*, 10 How. 395 (1850); *Locke* v. *New Orleans*, 4 Wall 172 (1876); questioned in *Ogden* v. *Saunders*, 12 Wheat 213, 286 (1827); *Salterlee* v. *Matthewson*, 2 Pet. 380, 416 (1829) (opinions of Johnson, J., as to which see Note, *Ex Post Facto in the Constitution*, 20 Mich. L. Rev. 315, 329-330 (1922).

Within those parameters the classic statement relating to the *ex post facto* prohibition remains that of Justice Chase in *Calder* v. *Bull*.[14] To violate the *ex post facto* prohibition, the statute must be retrospective, although the converse is not necessarily true, i.e., a retrospective statute imposing a less onerous punishment would not be invalid as *ex post facto*. *Calder* v. *Bull*, 3 Dall. 386, 391 (1798). It remained for judicial construction to explore the meaning of the prohibition. The phrase "without explanation . . . is unintelligible, and means nothing" and "[l]iterally, it is only that a law shall not be passed concerning, and after the fact, or thing done, or action committed." *Id.* at 390. Rather than ascribe such a literal interpretation, it was deemed to accord with "the obvious meaning and intention of the prohibition" to hold that it was "inserted to secure the person of the subject from injury, or punishment, in consequence of such law." *Id.* at 390. Justice Chase, in an oft-cited pronouncement, then set forth classes of laws precluded by the *ex post facto* prohibition:

> "I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law; and which was inno-

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[14] 3 Dall. 386 (1798). Although only one of several seriatim opinions the opinion of Justice Chase without question was early adopted by the Court. See *Cummings* v. *Missouri*, 4 Wall. 277 (1867). A later opinion referred to the Chase opinion as the "opinion of the court." *Kring* v. *Missouri*, 107 U.S. 221, 227 (1883). But see Crosskey, *The True Meaning of the Constitutional Prohibition of Ex Post Facto Laws*, 14 U.Chi. L.Rev. 539, 558-559, n. 42 (1947).

> cent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. *Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.* 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender. *All these, and similar laws, are manifestly unjust and oppressive.*" *Id.* (latter two emphasized phrases supplied).

The present case manifestly involves a situation encompassed by the second category enumerated in *Calder* or, at the very least, is in the class of laws "similar" to that category. The subsequent cases which identify those matters included within the concept of infliction of greater punishment accordingly warrant examination. Thus, in *Cummings* v. *Missouri*, 4 Wall. 277 (1867) the Court struck down a provision of the Missouri Constitution requiring, *inter alia*, an oath by a priest in effect denying prior support of the Confederacy as a condition of further service in his ministry under pain of fine or imprisonment. In sustaining a claim that the oath violated the *ex post facto* prohibition the Court observed:

> "The disabilities created by the Constitution of Missouri must be regarded as penalties — they constitute punishment. We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty or property, and that to

take from him anything less than those is no punishment at all'. . . . "

"The theory upon which our political institution rests is, that all men have certain inalienable rights — that among these are life, liberty and the pursuit of happiness. . . . Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined." *Id.* at 320-322__.

In further analysis of the *ex post facto* prohibition the Court observed that although the Missouri constitutional provisions under attack did not by their terms define a crime or declare that any punishment be inflicted, nevertheless " . . . they produce the same result upon the parties against whom they are directed." *Id.* at 327.[15] The Court emphasized that the provisions were "*aimed at past acts and not future acts.*" *Id.* (emphasis added). The provisions not only in part criminalized prior innocent behavior, but with significance to the ins-

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[15] Not contra are cases relating to attachment of conditions to ongoing or continuing offenses; e.g., *Murphy* v. *Ramsey*, 114 U.S. 47 (1885) (disenfranchisement arising from an existing state of bigamy or polygamy held not retroactive); *McDonald* v. *Massachusetts*, 180 U.S. 311 (1901); *Gryger* v. *Burke*, 334 U.S. 728 (1948) (imposition of enhanced sentence under habitual offender statute is punishment for the later offense); *Samuels* v. *McCurdy*, 267 U.S. 188 (1925) (imposition of penalty for continued possession of liquor obtained before enactment of law). See, however, *Hawker* v. *New York*, 170 U.S. 189 (1898), holding that a statute enacted subsequent to a felony conviction could be enforced to preclude a physician from the practice of medicine as a proper exercise of police power to insure proper qualifications for future practice of medicine and purporting to distinguish *Cummings*. *Accord*, *Reetz* v. *Michigan*, 188 U.S. 505 (1903); *Garner* v. *Board* 341 U.S. 716 (1951).

tant case were held to have imposed additional punishment after the fact to certain acts which were already punishable:

> "Some of the acts at which the oath is directed constituted high offences at the time they were committed, to which, upon conviction, fine and imprisonment, or other heavy penalties, were attached. The clauses which provide a further penalty for these acts are also within the definition of an *ex post facto* law —— 'they imposed additional punishment to that prescribed when the act was committed.' " *Id.* at 328.

On the same day the Court struck down the application of an Act of Congress to an attorney who declined to take an analogous oath. *In the Matter of Garland*, 4 Wall. 333 (1867). *See also Pierce* v. *Carskadon*, 16 Wall. 234 (1873) (following *Cummings* in invalidating West Virginia test oath).

In *Kring* v. *Missouri*, 107 U.S. 221 (1883), the Court addressed itself to the attempted application to a defendant of a change in Missouri statutory law subsequent to the commission of the offense which had the effect of denying to the defendant on retrial the benefit of an earlier plea of guilty to a lesser offense. Under previously existing law, that plea would have operated as an acquittal of the principal charge. This denial on retrial resulted in imposition of the death penalty in lieu of the former sentence of 25 years. Answering the claim that this was a change in procedure relating to the effect of a plea, the Court observed:

> " . . . can any substantial right which the law gave the defendant at the time to which his guilt relates,

> be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot." *Id.* at 232.

Adopting the tests set forth in *United States* v. *Hall*, 26 F. Cas. 84 (No. 15 285) (C.C.D. Pa) (1809), (Washington, J. on circuit), aff'd 6 Cranch 171 (1810), and in *Hartung* v. *People*, 22 N.Y. 95 (1860) the Court in *Kring* concluded:

> "We are of the opinion that any law passed after the commission of an offence, which . . . '*[i]n relation to that offense, or its consequences, alters the situation of a party to his disadvantage,*' is an *ex post facto* law, and . . . '[n]o one can be criminally punished in this country, except according to a law prescribed for the government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time.' " 107 U.S. at 235 (first emphasis supplied).

In accord is *In the Matter of Medley*, 134 U.S. 160 (1890), which articulated not only the *Calder* "greater punishment" test but relied upon the "altering to disadvantage" test recognized in *Kring*. In so doing, the Court struck down a retroactive imposition of solitary confinement upon a prisoner sentenced to death observing that it was not "a mere unimportant regulation as to the safekeeping of the prisoner," *id.* at 167, and in fact "was an additional punishment of the most important and painful character." *Id.* at 171. Held equally defective was a statutory provision permitting the warden to establish a time of death without advising the prisoner.

In so holding, the Court elaborated upon the feature of enhanced punishment:

> "Nor can we withhold our conviction of the proposition that when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place. Notwithstanding the argument that under all former systems of administering capital punishment the officer appointed to execute it had a right to select the time of *the day* when it should be done, this new power of fixing any day and hour during a period of a week for the execution is a new and important power conferred on that officer, and is a departure from the law as it existed at the time the offense was committed, and with its secrecy must be accompanied by an *immense mental anxiety amounting to a great increase of the offender's punishment.*" *Id.* at 172 (latter emphasis supplied).

Of equal, if not greater, relevance in review of the standards employed in earlier cases is *Lindsey* v. *Washington*, 301 U.S. 397 (1937). There the Court struck down as *ex post facto* a Washington statute requiring imposition of a mandatory maximum sentence which under the former statute had been subject to discretion of the trial judge. Noting that for the purpose of applying the *ex post facto* prohibition it would accept the meaning ascribed to the statute by the highest court of the state, nevertheless the Court held that it would

apply a federal standard in determination of the question of whether a prohibited *ex post facto* law was present. *Id.* at 400.

The Court then examined whether the subsequent standard of punishment in fact was more onerous than the earlier one. In so doing it considered the ancillary effects of the state parole process:

> " . . . The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. . . . *It is for this reason that an increase in the possible penalty is ex post facto, regardless of the length of the sentence actually imposed*, . . . since the measure of punishment prescribed by the later statute is more severe than that of the earlier. . . .
>
> Removal of the possibility of a sentence of less than fifteen years, at the end of which petitioners would be freed from further confinement and the tutelage of parole revocable at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change. . . . Yet this is only a more striking instance of the detriment which ensues from the revision of a statute providing for a maximum and minimum punishment by making the maximum compulsory. *We need not inquire whether this is technically an increase in the punishment annexed to the crime. . . . It is plainly to the*

> *substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term.*" *Id.* at 401-402 (emphasis supplied).

It is manifest that if deprivation of an opportunity for consideration for a lesser sentence by a trial judge is fatal, loss of the right to earn gain time is equally, if not more, defective.

Of importance is the test adopted in the plurality opinion in *De Veau* v. *Braisted*, 363 U.S. 144 (1960), upholding restrictions on employment of felons in waterfront employment:

> "The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts. *The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity*, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession. *Id.* at 160 (emphasis supplied).

The greater punishment test of *Calder*, the "altering to disadvantage test" of *Kring* and *Medley* (expressed as "substantial disadvantage" in *Lindsey*) and the "unpleasant consequences" test of *De Veau* led naturally to the decision in the case closest in point factually to the present case.

The memorandum affirmance in *Scafati* v. *Greenfield*, 390 U.S. 713 (1968), *affirming* 277 F. Supp. 644

(D. Mass. 1967), is almost squarely in point factually and legally. That decision affirmed a three judge district court which had held that a Massachusetts statute forbidding a prisoner from earning good conduct deductions for six months following reincarceration for parole violation could not be applied to a prisoner originally sentenced under statutes lacking such a prohibition even though he was paroled subsequent to the effective date of the second statute. Speaking through Circuit Judge Aldrich, the district court had held:

> " . . . we see no distinction between depriving a prisoner of the right to earn good conduct deductions and the right to qualify for and hence earn, parole. Each, to quote In re Medley, . . . materially 'alters the situation of the accused to his disadvantage.' " 277 F. Supp. at 646.

The only distinction between *Scafati* and the instant case is that in *Scafati* there was a *complete* denial of the right to earn gain time for a *limited* period, whereas in this case there is a *substantial*, albeit not total denial, for the entire remainder of the sentence, *i.e.* here there is a limited loss for the total time *vis-a-vis* total loss for a limited time in *Scafati*. That it was a memorandum affirmance does not detract from its status as a judgment on the merits. *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975). Apparently, the Supreme Court of Florida, in the instant case, viewed as significant the fact that the right to earn gain time was not "eliminated" (376 So. 2d at 857) (A 22a), although, of course, it did not discuss or cite *Scafati*, nor did it explain at what point deprivation became "elimination".

In *Warden* v. *Marrero*, 417 U.S. 653 (1974), the Court analyzed the nature of punitive sanctions in a context furnishing illumination to this case. In construing the definition of "punishment" in a saving clause that was argued to preserve a "no-parole" statute, the Court observed:

> "First, *only an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole. . . . For the confined prisoner, parole — even with its constraints — is a long step toward regaining lost freedom.* An observation made in somewhat different context is apt: 'It may be "legislative grace" for Congress to provide for parole but when it expressly removes all hope of parole upon conviction and sentence for certain offences, . . . this is in the nature of an additional penalty.' [Citation omitted.]
>
> "Second, a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the ex post facto clause of Art. I, §9, cl. 3, of the Constitution of whether it imposed a 'greater or more severe *punishment* than was prescribed by law at the time of the . . . offense.' " *Id.* at 663 (first emphasis added) (footnote omitted).

In *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), the Court, *inter alia*, considered the extent to which the Due Process Clause of the Fourteenth Amendment related to prison disciplinary proceedings, including loss of gain time. The Court clearly recognized that loss of gain time credits was a punishment "which affects the term of confinement." *ID.* at 547. Although not equivalent to

parole, the Court observed that "the deprivation of good time is unquestionably a matter of considerable importance." *Id.* at 561.

The Court further stated:

> "We also reject the assertion of the State that whatever may be true of the Due Process Clause in general or of other rights protected by that Clause against state infringement, the interest of prisoners in disciplinary procedures is not included in that 'liberty' protected by the Fourteenth Amendment. It is true that the Constitution itself does not guarantee good time credit for satisfactory behavior while in prison. But here the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior. Nebraska may have the authority to create, or not, a right to a shortened prison sentence through the accumulation of credits for good behavior, and it is true that the Due Process Clause does not require a hearing 'in every conceivable case of government impairment of private interest. . . . ' But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the State-created right is not arbitrarily abrogated." *Id.* at 556-557.

Although *Wolff* involved loss of gain time already accrued, the view that such accrued time is a liberty in-

terest logically supports the present contention that arbitrary deprivation or reduction of the right to acquire such gain time affects liberty and thus constitutes punishment.

In passing, the case of *Dobbert* v. *Florida*, 432 U.S. 282 (1977) must be mentioned. It did present an issue of retroactive denial of parole, which, if decided, might have been relevant to the present case. However, the defendant was held to be without standing. The Court held:

> "Petitioner's third ex post facto contention is based on the fact that the new Florida statute provides that anyone sentenced to life imprisonment must serve at least 25 years before becoming eligible for parole. The prior statute contained no such limitation. . . . Petitioner contends that nonetheless its enactment by the Florida Legislature amounts to an ex post facto law, and that because of this he may successfully challenge the death sentence imposed upon him.
>
> Petitioner, of course, did not receive a life sentence, and so any added onus attaching to it as a result of the change in Florida law had no effect on him." *Id.* at 298.

The decisions of this Court in summary hold that an *ex post facto* law is a statute with retrospective features aimed at past acts operating in a criminal case (1) inflicting a punishment greater than that provided by statutes in effect at the time of the commission of the offense, (2) having a similar effect to the first category, (3) altering the situation of a criminal defendant as

established by prior law to his substantial disadvantage, or (4) imposing unpleasant consequences upon a prisoner for prior conduct. Alteration of sentencing discretion, deprivation of opportunity to acquire parole, infliction of mental anxiety and complete denial of the right to acquire gain time for a limited period clearly have been held within those parameters. The *substantial* reduction of opportunity to acquire gain time must conceptually be viewed in the same light. This is particularly true because gain time is a constitutionally protected liberty interest. As will be demonstrated, the lower courts have overwhelmingly so held in gain time cases. The result below was bottomed, instead, upon the almost universally rejected "act of grace" view which, in any event, will not withstand critical analysis.

Application Of General Principles In State And Lower Federal Courts

Gain Time

The question of the applicability of *ex post facto* clauses, both of the federal and state constitutions, has arisen numerous times in proceedings in state and lower federal courts. In the vast majority of such circumstances, the courts have agreed that the *ex post facto* clause is applicable to legislative or administrative action which deprives a prisoner of the opportunity to earn gain time when such legislative or administrative action is taken after the time of the offense.

Three very recent decisions, *Adkins* v. *Bordenkircher,* 262 S.E. 2d 885 (W. Va. 1980), *Dunn* v. *Jenkins,* 377 N.E. 2d 868 (Ind. 1978) and *State ex rel. Bickman* v. *Dees,* 367 So. 2d 283 (La. 1978), decided the issues identical to those before this Court. In these cases, legislation (*Dunn* and *Bickman*) or legislation combined with executive action (*Bordenkircher*) promulgated after the time of the offense reduced the amount of gain time per month which could be earned by a prisoner. In these cases the courts found the changes to violate the ex post facto clauses of the United States and their respective state constitutions. In *Dees,* the Louisiana Court relied on its earlier decision in *State* v. *Curtis,* 363 So. 2d 1375 (La. 1978), in which the court discussed the theory of lack of "vested rights," utilized by the Florida Supreme Court in *Harris* v. *Wainwright,* 376 So. 2d 855 (Fla. 1979), to deny petitioner the relief he now seeks before this Court. In rejecting that view in favor of the ruling of this Court in *Lindsey* v. *Washington,* 301 U.S. 397 (1937), the Louisiana court concluded:

> "There is no analytical distinction between eligibility for parole (and analogously probation) and eligibility for dimunition of sentence through good time. *In neither situation is there a vested right.* Indeed at the time of commission of the offense in each situation the law simply provides opportunity for an accused later convicted that during the course of serving his sentence, he will be able to try to earn early release from confinement. In each case 'release eligibility' (a phrase used in *Lindsey* v. *Washington, supra* . . .) is significantly affected." 363 So. 2d at 1382-83 (emphasis added).

Most of the courts dealing with the issue have decided that the *ex post facto* prohibition prevents withdrawal, after the date of the offense, of the right to earn gain time for such offense. They have, at least by implication, held such statutory provision for good time to be a part of the "law annexed to the crime, when committed".[16] This principle has been made quite explicit in a number of decisions. In *Dowd* v. *Sims,* 95 N.E. 2d 628 (Ind. 1950), the Indiana Supreme Court invalidated legislation passed subsequent to the prisoner's conviction, which legislation allowed the board of trustees of a prison to deprive the prisoner of gain time for a parole violation. The court expressly linked the gain time statute to the sentence:

> "The good time law then in effect at the time the offense was committed 'enters into the judgment as if written therein.' "

Id. at 630, *citing Woodward* v. *Murdock,* 124 Ind. 439, 444, 24 N.E. 1047, 1048 (1890). *Accord, State* v. *Ellsworth,* 380 P. 2d 886, 888 (Mont. 1963); *Application*

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[16] *But see Graham* v. *Thompson,* 246 F.2d 805, 807 (10th Cir. 1957). The *Graham* holding is a minority view. It clearly overlooks the realities of criminal practice in which defendant and court alike are peculiarly sensitive to the ever-present question, "How much time must I do?" Conversely, to suggest that the term "annexed" is to be construed literally would not only be an absurdity, but it would ignore the condemnation in *Calder* of "similar laws." 3 Dall. at 390. Petitioner also agrees with the Third Circuit's conclusion that the continued viability of *Graham* v. *Thompson* is questionable. *Geraghty* v. *United States Parole Commission,* 579 F.2d 238, 266-267 n. 136 (3d Cir. 1978), *rev'd in part on other grounds,* _____ U.S. _____, 63 L.Ed. 2d 479 (1980).

of Fredericks, 315 P.2d 1010 (Ore. 1937); *Ex Parte Ridley,* 106 P. 549, 555 (Okla. 1910).

The closeness of the connection between the sentence and good time is crystallized in *Durant* v. *United States,* 410 F.2d 689 (1st Cir. 1969). In that case, the First Circuit held that a federal district judge erred in failing to advise a criminal defendant, pleading guilty under Rule 11, Fed. R. Crim. P.,[17] that he would not be eligible for gain time. The court explained:

> "[T]he removal of hope due to the loss of all opportunities to earn 'good time' is a substantial deprivation, effecting a fundamental variation in sentence beyond mere calendar years. We do not suggest that a defendant need be given a detail of every consequence of his sentence, but the loss of something important enough to make a deprivation after sentence constitutionally impermissible, cf. *Greenfield* v. *Scafati,* 277 F. Supp. 644 (D. Mass. 1967), affirmed, 390 US 13, 88 S. Ct. 1409, 20 L. Ed 2d 250 (1968), is a matter of which a defendant should be informed in advance." (*Id.* at 692.)

The essence of that holding is that the opportunity to earn gain time, and therefore release, is so closely related to the sentence that Rule 11 requires the sentencing court to inform a defendant accordingly. It would be anomalous indeed for a court to hold that the oppor-

[17] Rule 11, Fed. R.Crim. P., provided, at the time of *Durant*: "The Court may refuse to accept a plea of guilty, and shall not accept such plea without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge *and the consequences of the plea.*" (Emphasis added.)

tunity to earn gain time is a consequence of a guilty plea requiring a trial court to address a pleading defendant personally to inform him of its consequences, yet is not part of the "law annexed to the crime, when committed."[18]

The protection accorded by the courts of the various states to statutory gain time is of long standing. In *State* v. *Tyree,* 70 Kan. 208, 78 P. 525 (1904), the Kansas Supreme Court considered the case of a prisoner whose crime was committed before the passage of a new sentencing act, under which good time was not provided. The legislation in effect at the time of commission of the crime provided, as does the Florida legislation, for mandatory gain time for good behavior. The later legislation provided for discretionary good time only. The court stated:

> "The right of the appellant under the law as it existed when he committed the offense to have a deduction of his sentence for good behavior was taken away from him by the act of 1903. This deprived him of a substantial right, and made the law of 1903, as to him, ex post facto." 78 P. 526. *Accord, Ex parte Lee,* 177 Cal. 690, 171 P. 938 (1918)

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[18] The Florida Supreme Court has, by implication, held that *bail* provisions are part of the "law annexed to the crime." In *Greene* v. *State,* 238 So. 2d 296 (Fla. 1970), the Court invalidated on *ex post facto* grounds, the application of a statute denying bail on appeal to those convicted prior to the passage of the statute. The Court arguably concluded so explicitly, as it opined that the "[d]enial of defendants' release on bail pending appeal *attached to offenses* that were committed prior to the effective date of the statute." *Id.* at 301 (emphasis added).

An even earlier case is *Murphy* v. *Commonwealth*, 172 Mass. 264, 52 N.E. 505 (1899). In that case, the Supreme Judicial Court of Massachusetts construed a new statute omitting prior provisions for reduction in sentence for good behavior to be applicable only prospectively to those who committed crimes after the effective date of the statute. The court pointed out, based on earlier decisions, that good time provided "an assurance of the highest character that upon condition of good behavior the convict shall have the promised benefit of an earlier release." *Id.*, 52 N.E. at 508. Further, "the benefit promised in consideration of good behavior was intended to be an actual reduction of sentence as a right, and not as a favor," and "therefore operated upon the sentence itself." *Id.* The Court concluded:

> "To have taken away the right of deduction for good behavior, or to have interfered with it to the disadvantage of the convict, would have been, in effect, to lengthen the sentence which was provided by law for the offense at the time when it was committed; and a statute which did that clearly would have been ex post facto." *Id.*

As a result, the Supreme Judicial Court of Massachusetts construed the statute to have prospective operation only, applying the salutary principle by which courts construe statutes to avoid questions of constitutional construction.

Ex post facto protection likewise extends to the statutory reduction of the amount of money a prisoner

can earn by his labor to be credited against a fine imposed under a conviction. *In re Hunt,* 28 Tex. App. 361, 13 S.W. 145 (1890).

In re Canfield, 98 Mich. 644, 57 N.W. 807 (1894), held that a statute entitling a prisoner to good time deductions, as does the Florida statute, gives the convicted defendant a "conditional right" to a reduction of his sentence. 57 N.W. at 808. A statute passed after the date of his sentence, providing for accrual of good time at slower rate than that in effect at the time of the crime, like Florida's, was held to be

> "*ex post facto,* its effect being to increase, and not to mitigate, petitioner's punishment. It follows that he is entitled to credit upon the basis of the earlier statute. To this case the later act has no application." *Id.*

To the extent that the legislature mandates good time, one who commits a crime on a date when such a statute is in effect is entitled to have it applied to him. Any later statute whose "effect [is] to increase, and not to mitigate [the prisoner's] punishment" must, by this court's interpretations of the *ex post facto* clause, be unconstitutional.

Presenting the minority view, the Appellate Division of the Superior Court of New Jersey characterized parole, in the context of legislation withdrawing the opportunity to earn gain time for good behavior, as a matter of "legislative grace and not a thing of right." *Zink* v. *Lear,* 28 N.J. Super. 515, 101 A. 2d 72, 77 (N.J.

App. Div. 1953).[19] The court opined: "When sentence is imposed upon a defendant, there is no constitutional guaranty that the provisions regarding parole will remain constant; the only constitutional inhibition is that no law may be passed increasing the punishment for the crime committed." *Id.* With due respect, it is submitted that this reasoning is fallacious. Even if it be conceded that no prisoner, anywhere, has a right to earn gain time in the absence of legislation, the characterization of gain time as a matter of legislative grace completely begs the question of whether, once an offense has been committed, the *ex post facto* prohibition allows the gain time rules applicable to such crime to be changed.

To the extent that state courts have held a statutory revocation of gain time to be a matter of grace not implicating the *ex post facto* clause, *People ex rel. Kleinger* v. *Wilson,* 5 N.Y. Supp. 2d 934 (App. Div. 1938), such holdings are susceptible to being changed in view of the numerous contrary interpretations of the applicability of the ex post facto clause. *People ex rel. Richardson* v. *Deegan,* 312 N.Y. Supp. 2d 666 (App. Div. 1979), for example, by implication overrules the earlier New York decision.

Singleton v. *Shafer,* 313 F.Supp. 1094 (E.D. Pa. 1970), is one of the few contrary decisions to come out of the federal system. It provided that repeal of a gain

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[19] This language is quite similar to that of the Florida Supreme Court: "[T]he allowing of gain time is an act of grace . . . [which] may be withdrawn, modified or denied." *Harris* v. *Wainwright,* 376 So. 2d 855, 856 (Fla. 1979). (A 21a)

time statute did not violate the *ex post facto* clause as to petitioners. The court did not discuss whether any petitioner in that case had committed his crime prior to, or after, the effective date of the statute, but simply held that gain time was a matter of executive grace. *Id.* at 1095-1096. The case may no longer be good law. *Geraghty* v. *United States Parole Commission,* 579 F. 2d 238, 265-266 n. 136 (3d Cir. 1978), *rev'd in part on other grounds,* _____ U.S. _____, 63 L. Ed. 2d 479 (1980). Even if this authority were accepted as persuasive, it would not apply in the case at bar which involves mandatory legislative gain time, i.e., specific amounts of gain time which the legislature requires to be awarded for good behavior, rather than, as in *Singleton,* gain time awarded in the discretion of the executive branch of government.

Parole

Cases arising in the context of parole statutes and administrative policies have frequently brought the *ex post facto* prohibition into play. Not surprisingly, the issues arising under these cases are quite similar to those arising in cases dealing specifically with gain time. Conceptually, they should be indistinguishable for *ex post facto* purposes. *Cf. Wolff* v. *McDonnell,* 418 U.S. 539, 561 (1974). Indeed, they are more persuasive because the granting of parole, by its very nature, is a patently more subjective act than the mathematical accrual of gain time measured only by good conduct.

The claim is frequently made that statutes and administrative regulations concerning parole are a matter of legislative or executive grace, not of "right," and that therefore, the *ex post facto* prohibition is not implicated when an opportunity for parole is withdrawn from one who has committed a crime prior to the effective date of the withdrawal. Even where the decision to grant or deny parole is a matter of discretion with the corrections department, or "an act of grace" where the law "grants petitioners as a matter of right the *opportunity* to be considered for parole after serving a given period of time," a retroactive increase of this period "alters the situation of petitioners to their disadvantage, . . . and, as such, is prohibited by both the Wisconsin Constitution and the United States Constitution." *State ex rel. Mueller* v. *Powers,* 64 Wis. 2d 643, 221 N.W. 2d 692, 694 (Wis. 1974) (emphasis added). *Accord, Goldsworthy* v. *Hannifin,* 468 P.2d 350 (Nev. 1970). As long ago as 1924, the Supreme Court of Louisiana confronted the argument that parole was not a matter of right but a matter of discretion of the Parole Board. *State ex rel. Woodward* v. *Board of Parole,* 99 So. 534 (La. 1924). The court stated:

> "There can be no doubt but that the right to be considered for a parole . . . was a substantial one . . . Of course, the right was not absolute or fixed in the sense that he was bound to be paroled; but the privilege of having his case submitted to the discretion of the board at the proper time did exist; whereas, now, it is entirely taken away, and the Board cannot even consider it under the present law.

> It would seem clear, therefore, that to give the laws of 1916 a retrospective effect would operate seriously to his disadvantage, in violation of the inhibition of constitution against ex post facto laws." *Id.* at 536.

Not surprisingly in light of *Greenfield* v. *Scafati, supra,* the overwhelming weight of recent authority follows the rule that a law passed after the date of the offense which eliminates or delays a defendant's parole eligibility is *ex post facto* as applied to that defendant. *Davis* v. *Mabry,* 585 S.W. 2d 949 (Ark. 1979); *State* v. *Gone,* 587 P. 2d 1291 (Mont. 1978); *Ex parte Alegria,* 464 S.W. 2d 868 (Tex. Crim. App. 1971). *Accord, In re Griffin,* 48 Cal. Rptr. 183, 408 P.2d 959 (Cal. 1965). The Florida Supreme Court has itself applied this principle. *Lee* v. *State,* 294 So. 2d 305 (Fla. 1974), *overruled on other grounds,* 340 So. 2d 474 (Fla. 1976). Contrary cases are clearly in the minority. *State ex rel. Koalska* v. *Swenson,* 66 NW 2d 337 (Minn. 1954), appeal dismissed, *cert. denied,* 348 U.S. 908 (1955).[20]

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[20] *Petition of Beaton,* 241 N.E. 2d 845 (Mass. 1968) is clearly distinguishable from the case at bar in that the offense for which petitioner was being punished was committed while he was on parole, *after* the effective date of a new statute of which petitioner complained increased the punishment for such crimes. Such a statute is clearly akin to habitual offender statutes, which have passed constitutional muster. *Id.* at 848. *Greenfield* v. *Scafati, supra,* should be carefully distinguished from *Beaton.* The petitioner in *Scafati* committed no separate criminal offense, but merely violated parole terms. In *Beaton,* by contrast, the legislature added to the penalty for crimes committed while on parole, and the new statute was effective prior to the commission of the offense by petitioner. That result does not contradict *Scafati.*

The case of *Taylor* v. *Mississippi State Probation and Parole Board,* 365 So. 2d 621 (Miss. 1978) must not only be characterized as highly unusual, but as distinguishable. In that case, the statute remained the same, but, pursuant to an attorney general's opinion, the Parole Board changed its interpretation of the statute. *Id.* at 622. That case, therefore, is completely distinguishable from the case at bar in that, in this case, a statutory enactment passed after the date of the offense altered eligibility for good time. The Supreme Court of Mississippi went on to hold that *administrative decisions* "with regard to parole law eligibility" do not amount to law "annexed to the crime when committed." *Id.* at 623. This decision is of no weight in analyzing a statutory change.

The United States Courts of Appeals have on numerous occasions considered the applicability under the *ex post facto* clauses of new parole guidelines to prisoners convicted of offenses committed prior to the date of the promulgation of such guidelines. The majority of such decisions have found such changes, when applied to such prisoners, to violate the *ex post facto* clauses. Significantly, even those cases finding no violation of the *ex post facto* clause typically do so on the basis that the changes will not increase the punishment applicable to the prisoner, or will even have an ameliorative effect on the punishment.

The promulgation of new guidelines denying eligibility for parole, where under previous practice parole eligibility was immediate, violates the *ex post fac-*

to prohibition. *Rodriguez* v. *United States Parole Commission,* 594 F. 2d 170 (7th Cir. 1979). Although there was no guaranty that parole would be granted at any time, the court noted that the new guidelines retroactively eliminated an opportunity for parole release, to the "substantial disadvantage" of the prisoner. *Id.* at 175. Such reasoning is *a fortiori* applicable to the case of a prisoner for whom state law *requires* that a sentence be reduced by a certain amount, when the rate of reduction of such sentence is later changed to his disadvantage.

The sensitivity of the United States Courts of Appeals to this issue is demonstrated by the case of *DePeralta* v. *Garrison,* 575 F.2d 749 (9th Cir. 1978). In that case, the issue was the applicability of new regulations added in 1976 to a prisoner sentenced in 1973 under the provisions of the Youth Corrections Act, 18 U.S.C. § 5010(c). The new regulations provided that the severity of the prisoner's offense could be taken into account in determining eligibility for parole. *Id.* at 751. This factor had not previously been stated in the regulations as a factor to be considered by the Parole Commission. The court granted relief although there was no explicit finding that the application of the new regulations had the effect of increasing the prisoner's sentence. In this case, by contrast, there can be no question that the application of the new gain time rules will increase the sentence substantially.

Where the courts of appeals have considered findings that retroactive application of parole guidelines would increase the amount of time served, they have

been unanimous in finding such application to violate the *ex post facto* clauses. *Rodriguez* v. *United States Parole Commission, supra; Geraghty* v. *United States Parole Commission,* 579 F.2d 238 (3rd Cir. 1978), *reversed in part on other grounds,* _____ U.S. _____, 63 L.Ed 2d 479 (1980); *Shepard* v. *Taylor,* 556 F.2d 648 (2nd Cir. 1977); *Love* v. *Fitzharris,* 460 F.2d 382 (9th Cir 1972), *vacated as moot,* 409 U.S. 1100 (1973). *Accord, People of the United States ex rel. Umbenhowar* v. *McDonnell,* 11 F.Supp. 1014 (N.D. Ill. 1934).

Ruip v. *United States,* 555 F.2d 1331 (6th Cir. 1977) found that the adoption of flexible parole guidelines, to guide the discretion of the parole commission in determining whether a parole should be granted, did not violate the *ex post facto* prohibition. *Accord, Zeidman* v. *United States Parole Commission,* 593 F.2d 806 (7th Cir. 1979); *Rifai* v. *United States Parole Commission,* 586 F.2 695 (9th Cir. 1978). As the *Rifai* court pointed out, "[Petitioner] has not convinced us that he suffered greater punishment under the 1976 standards than he would have received under the pre-1976 scheme." *Id.* at 699. Therefore, there is authority in the courts of appeal that changes in guidelines informing the discretion of parole commissions do not implicate the *ex post facto* prohibition *where the petitioner cannot demonstrate that such changes had the effect of increasing the punishment for the crime.* Where they do have such effect, however, the courts of appeal have been unanimous in holding the change violative of the *ex post facto* clauses. See cases cited *supra; see also Breest* v. *Helgemoe,* 579 F.2d 95 (1st Cir. 1978), *cert. denied* 439 U.S. 933 (1979).

Probation

Just as parole cases strongly support the position of petitioner, so do the probation cases. Courts considering changes in probation eligibility have found such changes to violate the *ex post facto* clauses when they are enacted after the date of the offense. In *State* v. *Mendivil,* 121 Ariz. 600, 592 P.2d 1256 (Ariz. 1979), the Arizona Supreme Court found that an Arizona statute violated the *ex post facto* clauses of the Arizona and the United States Constitution when a statute, passed after the date of the offense, added a penalty of two years probation to a sentence for which the prior maximum was one year. *Id.*, 592 P.2d at 1257. While the court stated its agreement "that probation or parole is not a Constitutional right but a matter of legislative grace," *id.* at 1258, it joined with the overwhelming weight of authority stated *supra,* that

> "statutes detrimentally affecting parole eligibility are unconstitutional insofar as applied to a prisoner charged with commission of a crime prior to the enactment of the statute." *Id.* at 1258, *citing In Re Griffin, supra; State* v. *Ellsworth, supra; Goldsworthy* v. *Hannifin, supra; State ex rel. Mueller* v. *Powers, supra.*

The Supreme Court of Kentucky has held a statutory revocation of the opportunity of a prisoner convicted of certain classes of offenses to apply for "shock probation" to violate the *ex post facto* clauses. *Blondell* v. *Commonwealth of Kentucky,* 556 S.W. 2d 682 (Ky. 1977). The court acknowledged that it "may be

'legislative grace' for the General Assembly to provide for shock probation," but pointed out that

> "[w]hen [the General Assembly] expressly removes all hope of shock probation upon conviction and sentence for certain offenses, this is in the nature of an additional penalty." *Id.* at 684.

Cases Cited By The Florida Supreme Court

After the foregoing analysis of lower court decisions it is well to analyze in detail the authorities cited by the Florida Supreme Court in support of its decision in *Harris* v. *Wainwright,* 376 So. 2d 855 (Fla. 1979). Numerous cases are mentioned in support of its unqualified assertion that "gain time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied." *Id.* at 856. This bald statement cites a number of state and federal cases, none of which conclusively support the position of the State in the case at bar and several of which actually contradict it.

Gilstrap v. *Clemmer,* 284 F.2d 804 (4th Cir. 1960) does not discuss *ex post facto* principles, but merely provides that a parole violator who has his parole revoked could be recommitted under good conduct deduction provisions of a statute passed subsequent to the date of the original offense. The retrospective application of the new penalty apparently was not challenged, however, on *ex post facto* grounds, because the *ex post facto* prohibition is not discussed in the opinion at all. To the extent that the opinion holds that the legislature may increase the penalty for parole violations as to prisoners whose

offenses were committed prior to the date of such legislation, it has been overruled by *Scafati* v. *Greenfield,* 390 U.S. 713 (1968), affirming 277 F. Supp. 644 (D. Mass. 1967).

The *ex post facto* prohibition was similarly not at issue in *Hiatt* v. *Compagna,* 178 F. 2d 42 (5th Cir. 1949), *aff'd per curiam* (by an equally divided court), 340 U.S. 880 (1950). In that case, petitioners were paroled and, after some unfavorable newspaper publicity, had their paroles revoked by the parole board after an informal hearing excluding petitioners' counsel. While the *ex post facto* prohibition was not discussed, the Fifth Circuit did hold in essence that the simple appearance of petitioners before the parole board satisfied due process. In dissent, Judge Waller pointed out that statutes requiring petitioners to be afforded an opportunity to appear before the parole board

> "[w]ere intended to require the Board to comply with the Constitutional prohibition against the deprivation of liberty without an opportunity to be heard, and the appearance allowed [petitioners] in this case afforded no such opportunity to be heard as the law and the Constitution contemplate." *Id.* at 47.

It is respectfully submitted that the dissenting opinion in that case states the law as it has been enunciated since by this Court, in *Morrissey* v. *Brewer,* 408 U.S. 471, 489 (1972). In any event, the stare decisis impact of the decision in *Hiatt* is obviously diminished by its having been affirmed by an equally divided court.

Estabrook v. *King,* 119 F.2d 607 (8th Cir. 1941) held that a statute allowing a convicted prisoner to be transferred to a hospital for "defective delinquents" and lose accrued good time did not vitiate the *ex post facto* prohibition in spite of that statute having been passed after the date of prisoner's conviction and sentencing. Like the decision below in the case at bar, the opinion in *Estabrook* discussed none of this Court's decisions concerning the *ex post facto* clause but merely relied on a characterization of good time allowance as "contingent" rather than "vested." Quoting *Douglas* v. *King,* 110 F. 2d 911 (8th Cir. 1940), the court stated: "Congress having extended the privilege, might withdraw it, except as to those persons in whom the privilege had ripened into a vested right." 119 F. 2d at 609. The citation to *Douglas* v. *King,* however, was inapposite, in that the *ex post facto* clause was not implicated in *Douglas.* In *Douglas,* petitioner was convicted on December 22, 1931, and the issue was the application as to him of the same defective delinquent statute, which came into effect on May 13, 1930. Although the date of petitioner's offense in *Douglas* is not a matter of record in that case, it certainly is not clear that the offense took place prior to the effective date of the defective delinquent statute.

Kastel v. *Fish,* 36 F. Supp. 700 (D. Md. 1931) held a decrease in discretionary good time allowance to be valid as applied to those convicted prior to the date of the change. The applicability of the *ex post factor* prohibition was not discussed by the court. In any event,

the case involved only discretionary good time and not mandatory good time as in the case at bar.

Shattuck v. *Grider,* 493 P. 2d 829 (Okla. Crim. App. 1972) holds only that a legislature may constitutionally provide for withdrawal of good time as a penalty for violation of parole. The applicability of the *ex post facto* clause was not raised by the pleadings or the facts in that case.

People ex rel. Colletti v. *Pate,* 31 Ill. 2d 354, 201 N.E. 2d 390 (Ill. 1964) held only that a legislature may validly delegate to an executive department the authority to prescribe a schedule of good time credits. Once again, no *ex post facto* issue was raised in the pleadings or even by the facts of that case.

Comerford v. *Commissioner of Correction,* 335 Mass. 714, 141 N.E. 2d 893 (Mass. 1957) discussed a change in the gain time statute *increasing* the amount of gain time for good behavior from six days to twelve and one-half days per month and eliminating entirely a four-day per month accrual of gain time for satisfactory work. While no *ex post facto* issue was discussed by the opinion, obviously the change made was ameliorative, not "alter[ing] the situation of [the accused] to his disadvantage." *Kring* v. *Missouri,* 107 U.S. 221, 235 (1883).

Lembersky v. *Parole Board of Department of Correction,* 332 Mass. 290, 124 N.E. 2d 521 (Mass. 1955) determined that a statute enacted subsequent to the commission of the offense, which provided for the same

rate of accrual of good time as the previous statute and merely changed the agency which would determine forfeiture of good time for parole violations, did not work to the disadvantage of the petitioner. The case is obviously distinguishable in that in the present case there can be no disputing that the second statute works to the disadvantage of the petitioner. *Lembersky* actually undercuts the opinion of the Florida Supreme Court below, in that the clear implication of the decision is that, had the change worked to the disadvantage of the petitioner, such change would have been invalidated. The court was explicit that petitioner could not "be subjected to a penalty more severe than that in force when the act was performed." *Id.* at 524.

Mayo v. *Lukers,* 53 So. 2d 916 (Fla. 1951) held that a petitioner whose parole was revoked was not entitled to have the unserved portion of his original sentence diminished by the time he was out on parole and that gain time could validly be forfeited upon a parole violation. The *ex post facto* prohibition was not implicated in the decision.

Dear v. *Mayo,* 153 Fla. 164, 14 So. 2d 267 (1943), *cert. denied,* 320 U.S. 766 (1943), provided only that gain time may be revoked for a parole violation. *Kimmons* v. *Wainwright,* 338 So. 2d 239 (Fla. 1st DCA 1976), *cert. denied,* 434 U.S. 843 (1977), is to the same effect. Neither case involved an *ex post facto* issue, nor under the facts therein could one have been raised.

The treatment of the cases distinguished by the Florida Supreme Court is revealing. *Dowd* v. *Sims,* 229

Ind. 54, 95 N.E. 2d 628 (Ind. 1950), for example, invalidated legislation, passed subsequent to the prisoner's conviction, which allowed the prison's board of trustees to deprive the prisoner of good time for parole violation. To distinguish this case, which is factually and legally identical to *Greenfield* v. *Scafati,* 390 U.S. 713 (1960), the Florida Supreme Court stated, "this is not a situation in which a new law has been passed eliminating the allowance of gain time in certain situations." No analysis was offered illuminating the purported distinction between the reduction and the elimination of gain time.

The Florida Supreme Court distinguished *Goldsworthy* v. *Hannifin,* 468 P. 2d 350 (Nev. 1970) on the basis that "[t]his is not a situation in which the entire scheme of criminal penalties has been revised." *Id.* at 857. A simple persual of *Goldsworthy* reveals that the revision to which the Florida Supreme Court refers was not even a matter under consideration by the *Goldsworthy* court. That court stated:

> "On July 1, 1967, the entire scheme of handling criminal penalties in the State of Nevada was changed by the legislature from indefinite to definite sentencing. *A concomitant change was made in the statute dealing with eligibility for parole to make it compatible with the new penalty scheme."* 468 P. 2d at 351 (emphasis added).

It was the change in parole eligibility, not the "entire scheme," which the *Goldsworthy* court considered and found constitutionally wanting because it provided

later parole eligibility for a prisoner convicted of a crime committed prior to July 1, 1967. The only difference of substance between *Goldsworthy* and the case at bar is that *Goldsworthy* involved eligibility for parole consideration and the instant case involved good time.

Two California cases, *In re Dewing,* 19 Cal. 3d 54, 136 Cal. Rptr. 708, 560 P. 2d 375 (1977) and *In re Valenzuela,* 275 Cal. App. 2d 483, 79 Cal. Rptr. 760 (3d Dist. 1969), were also distinguished. In both these cases, legislation passed subsequent to the date of the criminal offenses in question extended the maximum period of custody that could be imposed upon the petitioners. On the basis of *ex post facto* principles, both courts found such legislation to violate the *ex post facto* prohibitions of both the federal and California Constitutions. The Florida Supreme Court distinguished these cases as follows:

> "It is not a situation in which the length of incarceration for juvenile offenders has been extended." *Harris* v. *Wainwright,* 376 So. 2d at 857.

The fact that juveniles were involved in both those cases had nothing whatever to do with the applicability of *ex post facto* principles to the case.

Love v. *Fitzharris,* 460 F. 2d 382 (9th Cir. 1972), *vacated as moot,* 409 U.S. 1100 (1973) held an administrative change in parole regulations delaying petitioner's parole eligibility violated the *ex post facto* prohibition. The Florida Supreme Court, contrasting the case at bar, notes that "it is not a situation involving a

new and different interpretation of existing law." 376 So. 2d at 857. That distinction, of course, inures to the benefit of petitioner; where some courts have found difficulty applying the *ex post facto* prohibition to mere changes in guidelines or administrative interpretations by executive departments, e.g., *Taylor* v. *Mississippi State Probation and Parole Board, 365 So. 2d 621 (Miss. 1978) on the basis that they are not part of the "law annexed to the crime," to suggest that the ex post facto* prohibition applies only to new administrative interpretations and not to new statutory enactments is, quite simply, illogical.

Analysis of the Present Case in Light of Prior Decisions

Viewed in the light of the controlling decisions of this Court, there can be no doubt that the application to petitioner of the diminished gain time schedule prescribed by the second statute is forbidden by the *ex post facto* prohibition. Such a conclusion has already been reached by the overwhelming majority of lower courts confronted with the identical issue.

Firstly, this case should be regarded as controlled by *Scafati* v. *Greenfield*, 390 U.S. 713 (1968). The only possible factual "distinction" lies in the difference between total loss of the right to acquire gain time for a limited period and significant loss for a total period. If this were a legally cognizable distinction (and no court has so stated), it must lie in favor of petitioner because

application to petitioner of the *Scafati* penalty would penalize him at most 90 days (loss of maximum of fifteen days allowance under the first Florida statute for six months) as contrasted with the actual penalty of more than two years.

In a broader sense the position espoused by petitioner is indistinguishable from the result in *Lindsey* v. *Washington*, 301 U.S. 397 (1937). There the Court invalidated the alteration of a prescribed sentencing period from a permissive maximum within the discretion of the trial court to a mandatory period. The Court found a violation of the *ex post facto* clause in the deprivation of the right to be considered for the lesser sentence. In the instant case the existing law in question was not the subjective order of a trial judge; rather it attached as a matter of law to the sentence affording the petitioner himself the right to earn under objectively stated conditions an earlier release. If loss of opportunity for consideration be fatal, loss of right to earn should be viewed in the same light.

Even if *Scafati* and *Lindsey* are to be ignored, as they were below, the instant case manifestly meets the criteria generally established by this Court and almost universally applied in this situation by lower courts. The second statute most assuredly operates in a criminal case with retrospective features.[21] It clearly inflicts punish-

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[21] It is retrospective by the Florida Court's own definition. "*A law is retroactive or retrospective* if it takes away or impairs vested rights acquired under existing laws, or *if it . . . attaches a new disability in respect to transactions or considerations already past.*" *Heberle* v. *P.R.O. Liquidating Co.*, 186 So. 2d 281, 282 (Fla. DCA 1st 1966) (footnote omitted)(emphasis supplied).

ment greater than the statutes relating to the same subject which were in effect at time of the commission of the offense. *Calder* v. *Bull*, 3 Dall. 386 (1798). Ultimately, it alters the situation of petitioner substantially to his disadvantage (*Kring* v. *Missouri*, 107 U.S. 221 (1883) and *Lindsey* v. *Washington*, 301 U.S. 397 (1937)), or imposes unpleasant consequences upon petitioner for prior conduct (*De Veau* v. *Braisted*, 363 U.S. 144 (1960)).

The state has not quarreled with these precepts. Indeed it never has sought in these proceedings to demonstrate any state interest served by its application of the second statute to petitioner. Instead it below relied only on an alleged lack of vesting or stated differently the notion that gain time is an act of grace. To argue contractual concepts in dealing with constitutional principles is misplaced. *See State* v. *Curtis*, 363 So. 2d 1375, 1382-1383 (La. 1978). However, if relevant, it can be argued more convincingly that the petitioner's right that he be confined and thus deprived of his liberty only under law is indeed "vested" in the sense that it is a right which cannot be altered contrary to the fundamental law found in the *ex post facto* clause. Assuredly, the nature of the fundamental social compact cannot be so cavalierly disregarded. *Cf.* Madison, *The Federalist* No. 44 pp. 282-283 (Kendall and Caney, ed. 1965).

Moreover, the state's argument misses the point. Even if gain time were to be viewed as an act of grace, it cannot be urged that once established, the opportunity to earn gain time can be abolished or drastically reduced

without violation of the *ex post facto* prohibition. Once the right to earn has been established, its alteration certainly is subject to federal constitutional restrictions. As noted in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), once the state has granted the right to earn gain time, that right becomes a "liberty" interest subject to the procedural protections of the Fourteenth Amendment.[22] Conceptually, there is no difference in the instant case. A liberty interest so protected necessarily is also a liberty interest whose deprivation results in a forbidden increase in punishment. There is no real distinction between denial of leniency and enhancement of punishment. In *Roberts* v. *United States*, _____ U.S. _____, 63 L.Ed. 2d 622 (1980), this court noted:

> "We doubt a principled distinction may be drawn between 'enhancing' the punishment imposed upon the petitioner and denying him the 'leniency' he claims would be appropriate if he had cooperated." *Id.* at 628 n.4.

See also *Warden* v. *Marrero*, 417 U.S. 653, 663 (1974) suggesting that removal of hope of parole, even if originally viewed as "legislative grace", would be in the nature of an additional penalty.

Casting further doubt on the absence of vesting theory, it must be recognized that here there is a con-

[22] Of at least some relevance is the fact that the opportunity to acquire release (on parole) tempered the Eighth Amendment analysis of the Texas recidivist statute in *Rummel* v. *Estelle*, _____ U.S. _____, 63 L.Ed. 2d 382, 395 (1980). It is dubious that parole would have been so considered were it subject constitutionally to arbitrary withdrawal.

siderable "reliance" interest. Although it may be idle to contend that a crime is committed in "reliance" on any requirement or lack of requirement of the law, it is quite realistic to suggest that from the time of trial or sentencing, many decisions are made in "reliance" on the existing state of the law. Although the nature of the historical evolution of *ex post facto* doctrine has made the date of the offense the dividing point, *Calder* v. *Bull*, 3 Dall. 386 (1798), it is not without significance that in this case a negotiated plea of guilty was entered before the date of statutory change. It is manifest that gain time is an integral part of a sentence. It is an axiom in the combative atmosphere of the American criminal justice system that prosecutor, defendant, and judge alike are all attuned to *actual* as opposed to theoretical punishment. "Gain time reduces the length of time required to be served on a sentence." Note, *Prisoners' Gain Time: Incentive, Detriment or Ritual Response?*, 21 U.Fla. L.Rev 103, 104 (1968). In Florida, gain time is viewed a positive incentive to encourage orderly conduct and *early* rehabilitation. *Nicholas* v. *Wainwright*, 152 So. 2d 458 (Fla. 1963). Only the "unusual prisoner" described in *Warden* v. *Marrero*, 417 U.S. 653, 663 (1974) would not view loss of opportunity to acquire gain time as a penalty.

Even more importantly the sentencing court would have the same concern. Unlike parole, gain time establishes a mandatory release date that controls the length of incarceration except to the extent that gain time has been forfeited for misconduct. Thus, it is abun-

dantly clear that gain time is, indeed, part of the sentence, and it has been so considered by members of the judiciary. To argue otherwise would be to argue that a court is presumed *not* to know the law.

As stated by then District Judge Jon O. Newman, now United States Circuit Judge for the Second Circuit and former United States Attorney for the District of Connecticut,

> "American sentencing is afflicted with the Slovik[23] syndrome: the expectation that the sentence will not be fully carried out. . . . Has anyone realized how frequently the different sentences simply reflect the different expectations of the sentencing judges as to what proportion of the sentence the offender will serve before being paroled?" Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 *Yale L.J.* 810, 812 (1975).

A fortiori this observation as to parole is true of gain time. This conclusion is supported by published reports of various sentencing institutes designed for an attended by members of the federal judiciary.

Most significantly with regard to the case at bar, sentencing institutes for federal trial judges often include informative instruction with regard to the treatment of gain time under comparable federal statutes. For exam-

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[23] The reference is to *United States* v. *Slovik*, the case of an American soldier executed for desertion in World War II. The members of the court-martial apparently felt the death sentence awarded would not be imposed.

ple, documents that were utilized in one sentencing institute included a specific instruction stating:

> "In determining sentence, note that the behavioral 'good time' is earned at the rate of at least five days per month (§4161) and industrial 'good time' is earned at the rate of approximately two days per month (§4162), but that accumulated 'good time' is forfeited by bad behavior." (Citations are to Title 18 of the United States Code). *Paper Delivered at the Institute on Sentencing for United States Judges*, 35 F.R.D. 381 (1964).

Similarly, the Honorable Walter B. Hoffman noted that Title 18, United States Code §§4161-4163 provide a "mandatory release provision." Hoffman, *Purposes and Philosophy of Sentencing*, 75 F.R.D. 287, 295 (1977). Judge Hoffman further stated that the good time allowances prescribed by the cited statutes are "available where the record of conduct shows a faithful observance of all rules and [the prisoner] not being subjected to punishment." *Id.* He also referred to industrial good time and good time allowance for the performance of exceptionally meritorious service. *Id.* at 296. Judge Hoffman expressly recognized that release "follows as a matter of course, with the sentence being credited by the good time allowances. . . . " *Id.* He contrasted this type of release from eligibility for parole which "is *not* a mandatory release." *Id.* (emphasis original). A similar discussion of good time can be found in Partridge, Chase & Eldridge, *The Sentencing Options of Federal District Judges*, 84 F.R.D. 175, 180, 183-184 (1979).

It therefore would be unrealistic to contend that gain time is a mere procedural creature of the legislature, subject to its arbitrary whim and caprice. To so urge is to ignore that its existence and its specific provisions are in the forefront both of the thoughts of those who plead guilty (or indeed of those who risk trial) and those who sentence. Surely, the state cannot suggest that there is no possibility that the sentencing judge in this case would not have inflicted a lesser sentence had he been given fair warning of the new gain time schedule.

It is clear that the second statute is "retrospective" within the meaning of *Calder*. It is retrospective because it takes notice of the past, and in so doing, alters an existing punishment for past misconduct. It is "aimed at past acts and not future acts." *Dummings* v. *Missouri*, 4 Wall. 277, 327 (1867). It is directly related to acquisition of gain time as a reduction of a sentence which was imposed as a punishment for prior behavior. The offense in question has occurred — its commission cannot be deterred. The reduction in gain time serves only to enhance punishment for that past offense by reducing the benefits to be acquired by *good conduct*. Obviously, it does not operate to punish *future misconduct*.[24] Had

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[24] Of course, it might be argued that the "3-6-9" schedule of the second statute operates to reward good behavior (and thus deter misconduct) on the same theory as did the former "5-10-15" schedule. Thus it would postulate that a lesser reward still rewards and does not punish. On that theory, failure to implement capital punishment could serve as an ostensible reward. This theory also ignores the lack of a realistic distinction between increased punishment and a lessened reward. *Cf. Roberts* v. *United States*, _____ U.S. _____ 63 L.Ed 2d 622, 628 n. 4 (1980).

that been the intent of the Legislature, it would have dealt with the *consequences of future misconduct* by prisoners, e.g., prescribing a definition of a criminal offense with appropriate penalty or deprivation of future privileges after following procedures in keeping with *Wolff* v. *McDonnell*, 418 U.S. 539 (1974).

The second statute is not saved because the decreased gain time schedule only operates after the effective date. Such sophistry would save any *ex post facto* law. Indeed, under that fallacious reasoning, Florida could justify extension of the length of a sentence provided time already served was credited toward the enhanced sentence. It has been stated that " . . . a statute may be retrospective even if it does not purport to have effect prior to its enactment. . . " Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960). The instant statute clearly focuses on prior conduct and not the future. *Cf. DeVeau* v. *Braisted*, 363 U.S. 144 (1960).

Lurking in this case is the unanswerable question as to when, if at all, reduction would become the equivalent of complete deprivation. If the present alteration of 40 percent is permissible, under what rule of law would a 90 percent reduction be invalidated? These rhetorical questions demonstrate the soundness of the action of the Framers in denying a legislative body even the opportunity to act *ex post facto*.

An enlightening analysis is found in Note, *Ex Post Facto Limitations on Legislative Power*, 73 Mich. L.Rev. 1491, 1501 (1975):

> " . . . in deciding whether a law is proscribed by the *ex post facto* prohibition, a court should consider three factors: first, does the law penalize activities in the absence of fair warning and frustrate reasonable reliance on existing laws; second, can the law serve its ostensible purpose — for instance, does the law attempt to regulate behavior through threats of unpleasant consequences where deterrence is no longer possible; and, finally, could the law have been a consequence of legislative vindictiveness."

All of these questions are answered in the affirmative on this record. The *ex post facto* clause clearly is violated. The Constitution requires Florida to "keep its word" as expressed by its Legislature and do no less than what its law provided as presumptively relied on by its courts and by petitioner.

CONCLUSION

The petitioner is entitled to have his right to earn gain time calculated in accordance with Section 944.27, Florida Statutes (1975), as it was in effect on January 31, 1976, the date of the offense in question. The application of Section 944.275, Florida Statutes (1979) to petitioner should therefore be declared violative of the *ex post facto* clause. Accordingly, the judgment of the Supreme Court of Florida should be reversed with appropriate directions to enter an amended judgment.

Respectfully submitted,

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APPENDIX

EXHIBIT

Principal Florida Statutes and Session Laws

Section 944.27, Florida Statutes (1975)

944.27 Gain-time for good conduct; schedule of allowances; cumulative sentences to be treated as one sentence for purposes of allowing and forfeiting.—

(1) The [1][Department of Offender Rehabilitation] shall grant the following deductions for gain-time from the sentences of every prisoner who has committed no infraction of the rules or regulations of the [2][department], or of the laws of the state, and who has performed in a faithful, diligent, industrious, orderly, and peaceful manner the work, duties, and tasks assigned to him, to wit:

(a) Five days per month off the first and second years of his sentence;

(b) Ten days per month off the third and fourth years of his sentence; and

(c) Fifteen days per month off the fifth and all succeeding years of his sentence; and he shall be entitled to credit for a month as soon as he has served such time as, when added to the deduction allowable, would equal a month.

(2) When a prisoner is under two or more cumulative sentences, he shall be allowed gain-time as if they were all one sentence and his gain-time, including any extra gain-time allowed him under s.944.29, shall be subject to forfeiture as though such sentences were all one sentence.

Section 944.275, Florida Statutes (1979)

944.275 Gain-time.—

(1) The department shall grant the following deductions for gain-time on a monthly basis, as earned, from the sentence of every prisoner who has committed no infraction of the rules of the department or of the laws of the state and who has performed in a satisfactory and acceptable manner the work, duties, and tasks assigned, as follows:

(a) Three days per month off the first and second years of the sentence;

(b) Six days per month off the third and fourth years of the sentence; and

(c) Nine days per month off the fifth and all succeeding years of the sentence;

and the prisoner shall be entitled to credit for a month as soon as the prisoner has served such time as, when added to the deduction allowable, would equal a month.

(2)(a) It is the intent of the Legislature that work programs be recognized as an integral part of the rehabilitative process and that gain-time under this section be awarded only if earned as provided herein.

(b) The department is authorized to grant additional gain-time allowances on a monthly basis, as earned, up to 1 day for each day of productive or institutional labor performed by any prisoner who has committed no infraction of the rules of the department or of the laws of this state and who has accomplished, in a

satisfactory and acceptable manner, the work, duties, and tasks assigned. Such gain-time allowances under this section shall be awarded on the basis of diligence of the inmate, the quality and quantity of work performed, and the skill required for performance of the work.

(c) The amount of time in a work program equivalent to 1 day shall be determined by the department. The department may provide for the award of gain-time under this subsection on a fractional basis for less than 1 day's participation in work programs.

(d) Any prisoner who, without approval, refuses or neglects to perform the work, duties, and tasks assigned in the correctinal work program shall forfeit gain-time as provided in s. 944.28.

(e) The department may grant additional gain-time allowances up to 6 days per month for any inmate who, because of age, illness, infirmity, or confinement for reasons other than discipline, does not participate in a correctional work program, who demonstrates a constructive utilization of time, and who has committed no infraction of the rules of the department or the laws of the state. However, no prisoner shall receive additional gain-time credits under both paragraph (b) and this paragraph during the same month.

(3)(a) An inmate who faithfully performs the assignments given to him in a conscientious manner over and above that which may normally be expected of him, against whom no disciplinary report has been filed within the preceding 6 months, and whose conduct, per-

sonal adjustment, and individual effort towards his own rehabilitation show his desire to be a better than average inmate or who diligently participates in an approved course of academic or vocational study may be granted on an individual basis from 1 to 6 days per month extra gain-time to be deducted from the term of his sentence.

(b) An inmate who does some outstanding deed, such as the saving of a life or assisting in recapturing an escaped inmate, or who is some other manner performs an outstanding service that would merit the granting of additional deductions from the term of his sentence, may be granted special gain-time on the basis of from 1 to 60 days.

(4) When a prisoner is under two or more concurrent sentences, the prisoner shall be allowed gain-time as if such sentences were all one sentence; and the prisoner's gain-time, including any additional gain-time allowed under subsectrion (2) and extra gain-time allowed under subsection (3), shall be subject to forfeiture as though such sentences were all one sentence.

(5) No gain-time shall be awarded except as provided in this section.

Chapter 76-273, Section 1 Laws of Florida

Section 1. Section 944.27, Florida Statutes, is amended to read:

944.27 Gain-time for good conduct; sechedule of allowances; cumulative sentences to be treated as one sentence for purposes of allowing and forfeiting.—

(1) The Department of Offender Rehabilitation shall grant the following deductions for gain-time *on a monthly basis as earned* from the sentences of every prisoner who has committed no infraction of the rules or regulations of the department, or of the laws of the state, and who has performed in a faithful, diligent, industrious, orderly, and peaceful manner the work, duties, and tasks assigned to him, to wit:

(a) Five days per month off the first and second years of *the* ~~his~~ sentence;

(b) Ten days per month off the third and fourth years of *the* ~~his~~ sentence; and

(c) Fifteen days per month off the fifth and all succeeding years of *the* ~~his~~ sentence; and *the prisoner* ~~he~~ shall be entitled to credit for a month as soon as *the prisoner* ~~he~~ has served such time as, when added to the deduction allowable, would equal a month

(2) It is the intent of the Legislature that work programs be recognized as an integral part of the rehabilitative process and that gain-time under this section be awarded only if earned as provided herein. No inmate shall receive additional gain-time allowances under this section solely by virtue of participation in academic classroom instruction.

(3) ~~(2)~~ When a prisoner is under two or more cumulative sentences, *the prisoner* ~~he~~ shall be allowed gain-time ~~as if they were all one sentence and his gain-time~~, including any extra gain-time allowed *the prisoner* ~~him~~ under s. 944.29, shall be subject to forfeiture as though such sentences were all one sentence.

Chapter 77-174, Section 1
(portion amending Section 944.27, Florida Statutes (1975)) Laws of Florida

The State Attorney shall make the final determination as to whether the prosection shall continue.

944.27 Gain-time for good conduct; schedule of allowances; cumulative sentences to be treated as one sentence for purposes of allowing and forfeiting.—

(2) When a prisoner is under two or more cumulative sentences, the prisoner shall be allowed gain-time *and his gain-time,* including any extra gain-time allowed the prisoner under s. 944.29, shall be subject to forfeiture as though such sentences were all one sentence.

Note.—Insertion made to correct an apparent typographic error.

Chapter 78-304, Laws of Florida

Section 1. Section 944.275, Florida Statutes, is created to read:

944.275 Gain-time, additional gain-time for program participation; extra gain-time.—

(1) The Department of Offender Rehabilitation shall grant the following deductions for gain-time on a monthly basis, as earned, from the sentences of every prisoner who has committed no infraction of the rules of the department or of the laws of the state and who

has performed in a satisfactory and acceptable manner the work, duties, and tasks assigned, as follows:

(a) Three days per month off the first and second years of the sentence;

(b) Six days per month off the third and fourth years of the sentence; and

(c) Nine days per month off the fifth and all succeeding years of the sentence;

and the prisoner shall be entitled to credit for a month as soon as the prisoner has served such time as, when added to the deduction allowable, would equal a month.

(2)(a) It is the intent of the Legislature that work programs be recognized as an integral part of the rehabilitative process and that gain-time under this section be awarded only if earned a provided herein.

(b) The department is authorized to grant additional gain-time allowances on a monthly basis as earned up to one day for each day of productive or institutional labor performed by any prisoner who has committed no infraction of the rules of the department or of the laws of this state and who has accomplished in a satisfactory and acceptable manner, the work, duties, and tasks assigned. Such gain-time allowances under this section shall be awarded on the basis of diligence of the inmate, the quality and quantity of work performed, and the skill required for performance of the work.

(c) The amount of time in a work program equivalent to one day shall be determined by the depart-

ment. The department may provide for the award of gain-time under this subsection on a fractional basis for less than one day's participation work programs.

(d) Any prisoner who, without approval, refuses or neglects to perform the work, duties, and tasks assigned in the correctional work program shall forfeit gain-time as provided in s. 944.28.

(e) The department may grant additional gain-time allowances up to 6 days per month for any inmate who, because of age, illness, infirmity, or confinement for reasons other than discipline does not participate in correctional work program who demonstrates a constructive utilization of time; and who has committed no infraction of the rules of the department or the laws of the state. However, no prisoner shall receive additional gain-time credits under both paragraphs (b) and (e) during the same month.

(3)(a) An inmate who faithfully performs the assignments given to him in a conscientious manner over and above that which may normally be expected of him and against whom no disciplinary report has been filed within the preceding six months, and whose conduct, personal adjustment and individual effort towards his own rehabilitation shows his desire to be a better than average inmate or who diligently participates in an approved course of academic or vocational study, may be granted on an individual basis from one to six days per month extra gain-time to be deducted from the term of his sentence.

(b) An inmate who does some outstanding deed, such as the saving of a life, assisting in recapturing an escaped inmate, or who in some other manner performs an outstanding service that would merit the granting of additional deductions from the the of his sentence may be granted special gain-time on the basis of from one to sixty days.

(4) When a prisoner is under two or more concurrent sentences, the prisoner shall be allowed gain-time as if such sentences were all one sentence, and the prisoner's gain-time, including any additional gain-time allowed under subsection (2) and extra gain-time allowed under subsection (3) shall be subject to forfeiture as though such sentences were all one sentence.

(5) No gain-time shall be awarded except as provided for in this section.

Section 2. Section 944.27, Florida Statutes, as amended by chapters 76-273 and 77-174, Laws of Florida, and sections 944.271 and 944.29, Florida Statutes, as amended by chapter 77-120, Laws of Florida, are hereby repealed.

Section 3. Section 20 of chapter 76-273, Laws of Florida, is amended to read:

Section 20. This act shall take effect July 1, 1976 ~~except that section 19 shall take effect January 1, 1979.~~

Section 4. This act shall take effect July 1, 1978.

Approved by the Governor June 16, 1978.

Filed in Office Secretary of State June 16, 1978.

Supreme Court, U.S.
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AUG 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5780

HOYT WEAVER, *Petitioner*,

v.

ROBERT GRAHAM, Governor of Florida, *Respondent*.

On Writ of Certiorari to
The Supreme Court of Florida

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5780

HOYT WEAVER, *Petitioner*,

v.

ROBERT GRAHAM, Governor of Florida, *Respondent*.

On Writ of Certiorari to
The Supreme Court of Florida

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion below, a per curiam memorandum decision, is reported at 376 So.2d 855 (Fla. 1979). It denied relief to petitioner on authority of *Harris v. Wainwright*, 376 So.2d 855 (Fla. 1979), a companion case decided on the same date.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on November 1, 1979. The petition for certiorari was filed on December 13, 1979 and granted as to Question One on March 17, 1980. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following federal constitutional provision is involved: "No State shall... pass any...*ex post facto* law." U.S.CONST. art. I, § 10, Cl. 1. The following state constitutional provision is involved: "No...*ex post facto* law...shall be passed." Fla.CONST. art. I, § 10. Several Florida statutes, notably § 944.27, F.S. (1975), and § 944.275, F.S. (1979), are involved. Those statutes in their entirety are

reproduced in the appendix to this brief.

QUESTION PRESENTED

WHETHER § 944.275, F.S. (1979), AS APPLIED TO PETITIONER, IS AN *EX POST FACTO* LAW.

STATEMENT OF THE CASE

Procedural History

The allegations under this subheading as set forth in petitioner's brief are substantially correct and will be accepted by respondent with the exception of the argumentative statement on p. 6 as follows: "The change now challenged lies in the dramatic reduction in the opportunity to acquire gain time for good conduct and thus procure a reduction in sentence." Although for different reasons, respondent agrees that this case can have dramatic repercussions for the numerous prisoners presently incarcerated in the Florida

penal system (petitioner's brief, p. 6, n. 6).

It is not surprising at all that the Florida Supreme Court in deciding *Harris v. Wainwright*, 376 So.2d 855 (Fla. 1979), did not discuss its prior holding in *Lee v. State*, 294 So.2d 305 (Fla. 1974). In *Lee*, the Florida Supreme Court clearly recognized that at a resentencing, the penalty provisions in effect at the time of the offense must be applied because to apply the penalty provided in the post-offense amendatory legislation would have required the defendant to serve a twenty-five year prison term before becoming eligible for parole and would be an *ex post facto* application and hence unconstitutional. The opinion in *Lee* illustrates the court's clear understanding of the nature of an *ex post facto* law, i.e., a

law which exposes a defendant to a greater penalty than that which originally could have been imposed at the time of the commission of the offense. 294 So.2d at 307. It would have been surprising if the court had discussed in *Harris v. Wainwright, supra,* its holding in *Lee* because the legislation with which the *Harris* court was concerned did not deprive the defendant of any protectible interest previously earned nor did it expose him to any greater penalty than that which could have been imposed at the time of the commission of the offense.

The Nature of Gain-Time

Gain-time or good-time as it is often called does not reduce the period of the original sentence but often has the effect of determining how much of that sentence must be spent within the confines of the

prison. *McKinney v. Taylor*, 358 F.2d 689 (10th Cir. 1966). Gain-time or good conduct statutes are framed with the intention of improving prison discipline. The allowance of gain-time or good-time credits is said to be in the nature of a payment or reward by the State to the prisoner for his good behavior. The purpose is to stimulate the prisoner to conform to the rules of the institution and to avoid the commission of crimes during his imprisonment. Such statutes must be viewed as being prompted by the highest motives of humanity and are generally looked on with favor. As stated by the court in *Mayo v. Lukers*, 53 So.2d 916 (Fla. 1951): "The ends to be obtained are the reform and rehabilitation of the prisoner and his return to and discharge of his duties to society." *Id.* at 917.

Statutes providing for gain-time credits are sometimes said to classify themselves generally into two groups. In the first group are those statutes which automatically reduce the period of imprisonment. This type of legislation forms a part of the judgment and the prisoner begins the service of his original sentence with the statutory assurance that the term thereof will be automatically abridged by law, unless by his own breach of prison discipline *he forfeits the credits which inhere in his sentence*. Under a statute of this first class, the presumption is in favor of the prisoner and the burden is on the State to show affirmatively the facts which defeat the claim to statutory allowances.

In the second group are those statutes which determine in advance the amount of gain-time which certain prisoners *may*

earn if certain specified terms and conditions are met. Under this type of statute, the gain-time is held out as a reward for good conduct or efficiency in prison labor. This type of statute cannot enter into the sentence or form a part of it because the reward *must first be earned before the prisoner is entitled to it. Stephens v. Conley*, 138 P. 189 (Mont. 1914).

By the express terms of the challenged statute, a prisoner is entitled to an award of statutory gain-time only when it is earned. This is the definitive construction placed on the statute by the Florida Supreme Court, *Harris v. Wainwright, supra,* and is binding on this Court as to what the statute means. *Wainwright v. Stone*, 414 U.S. 21, 38 L.Ed.2d 179, 94 S.Ct. 190 (1973); and *Miller v.*

California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973).

The Requisites of an *Ex Post Facto* Law Reexamined

Traditionally an *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed or a punishment in addition to that then prescribed. A statute belongs to the class of *ex post facto* laws when, *by its necessary operation, and in its relation to the offense, or its consequences*, alters the situation of the accused to his disadvantage. It follows that a law which alters punishment or inflicts a greater punishment than did the law annexed to the crime when committed is *ex post facto*. *United States ex rel. Forino v. Garfinkel*, 166 F.2d 887 (3d Cir. 1948); *Government of Virgin*

Islands v. Civil, 591 F.2d 255 (3d Cir. 1979).

There is respectable authority supportive of the premise that the constitutional prohibition against *ex post facto* laws applies only to changes in substantive law and not to changes in procedure. *Donald v. Jones*, 445 F.2d 601 (5th Cir. 1971), *cert.denied*, 404 U.S. 992; *James v. Twomey*, 466 F.2d 718 (7th Cir. 1972). Case law teaches that the *ex post facto* prohibition does not apply unless the statute is criminal or penal. *Doris v. Police Com'r of Boston, Mass.*, 373 N.E.2d 944 (Mass. 1979); *Agustin v. Quern*, 461 F.Supp. 441 (D.C.Ill. 1978).

It can be said that the constitutional ban on *ex post facto* laws reaches every law which makes criminal an act done before its enactment which was legal

when performed; every law that aggravates a crime or makes it greater than it was when committed; every law that changes the punishment and inflicts a greater punishment *than the law affixed to the crime when committed;* and every law that alters the legal rules of evidence and requires less or different evidence to convict than the law required at the time of the offense or otherwise, *by a change in the law in relation to the offense or its consequences* that alters the situation of a party to his disadvantage. *Breest v. Helegemoe,* 579 F.2d 95 (1st Cir. 1978), *cert.denied,* 439 U.S. 933; *State v. Bunn,* 440 P.2d 528 (Haw. 1968).

SUMMARY OF ARGUMENT

Application to petitioner of the new gain-time statute does not violate the *ex post facto* prohibition. The statute does not operate retrospectively and is not aimed at any prior act of petitioner. The challenged statute is applicable to all prisoners as of its effective date, July 1, 1978. The statute does not impose greater punishment because the gain-time provided for therein is no part of the original sentence and thus no part of the punishment annexed to the crime at the time petitioner was sentenced.

The challenged statute does not alter petitioner's situation to his disadvantage, nor does it impose unpleasant consequences upon him for prior conduct. The unpleasant consequences were visited upon

petitioner at the time of his sentencing and the challenged statute was no part thereof. Indeed, neither was § 944.27, F.S. (1975), any part of those unpleasant consequences because it too was no part of the punishment inflicted on petitioner at his sentencing. The new gain-time statute is remedial in nature and procedural in determining how prisoners can accumulate gain-time. The challenged statute cannot be *ex post facto* because it is less onerous than the prior law in effect at the time petitioner was sentenced.

Petitioner does not have a constitutionally protected liberty interest bottomed on a hope or expectation of gain-time yet to be earned. No court, including this one, has extended the reach of the Due Process Clause to this

extent in order to find a protectible right under existing law. A prisoner clearly must have more than an abstract need or desire for whatever it is he wants. He must have more than a unilateral expectation of it. He must instead have a legitimate claim of entitlement to it. *Board of Regents v. Roth*, 408 U.S. 564, 577, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972). Petitioner has no legitimate claim of entitlement to gain-time until it is earned and it is then and only then that he must be credited therewith.

ARGUMENT

WHETHER § 944.275, F.S. (1979), AS APPLIED TO PETITIONER, IS AN *EX POST FACTO* LAW.

Petitioner complains that he is deprived of gain-time by an *ex post facto*

law. In essence, it is *claimed* that since § 944.275, F.S., effective July 1, 1978 (hereinafter second statute or new statute), permits the accumulation of a lesser amount of gain-time or "good time" than did its predecessor, § 944.27, F.S. (1975) (hereinafter first statute or old statute), the application of the new statute to petitioner in the computation of his gain-time makes the statute an *ex post facto* law because it was not in effect at the time petitioner was convicted and sentenced. This precise issue was rejected by the Florida Supreme Court in *Harris v. Wainwright*, 376 So.2d 855 (Fla. 1979).

Remedial and/or Procedural
Aspects of the Challenged Statute

The statute challenged in this proceeding does not operate retrospectively. The

statute became applicable to all prisoners incarcerated in the Florida penal system on July 1, 1978 and operates prospectively only. The statute is not *ex post facto* legislation because it does not apply a new punitive measure to a crime already consumated to the detriment or material disadvantage of the wrongdoer. This is a necessary ingredient to an *ex post facto* claim. *Dobbert v. Florida*, 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977).

The statute is remedial and constitutes a procedural change in the statutory mechanism designed for the purpose of granting gain-time to deserving prisoners. The constitutional prohibition against *ex post facto* laws does not limit the legislative control of remedies and modes of procedure. *Beazell v. Ohio*, 269 U.S.

167, 169-171, 70 L.Ed. 216, 46 S.Ct. 68 (1925). Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*. *Hopt v. Utah*, 110 U.S. 574, 28 L.Ed. 262, 4 S. Ct. 202 (1884); *Thompson v. Missouri*, 171 U.S. 380, 43 L.Ed. 204, 18 S.Ct. 922 (1898). In the case at hand, the new statute is clearly procedural. Section 944.012 (6)[1] contains a statement of legislative intent in enacting The Florida Corrections Code of 1957, Ch. 944, F.S.A. The following language from *Hopt v. Utah, supra*, summarizes respondent's position that the new gain-time statute is procedural and thus not a violation of the Ex Post Facto Clause:

---

[1] § 944.012, F.S. (1979), is reproduced in its entirety in the appendix to this brief.

> "The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute."

110 U.S. at 589-590.

In the statement of the question presented (petitioner's brief, p. 3) and in the prefatory remarks to his argument (petitioner's brief, p. 15), it is urged that the challenged statute "altered the situation of petitioner to his disadvantage." A comparison of § 944.27, F.S. (1975), in effect at the time petitioner was convicted on May 13, 1976 (petitioner's brief, p. 3), and the new gain-time statute, § 944.275, F.S. (1979), will show the fallacy of this assertion.

The old statute in effect at the time petitioner was convicted provided the opportunity to earn five days gain-time

per month during the first and second years of the sentence; ten days per month during the third and fourth years of the sentence; and fifteen days per month during the fifth and all succeeding years of the sentence. The statute had no provision for the accumulation of work gain-time in addition to the statutory gain-time; no provision providing for gain-time allowances because of age, illness, infirmity, or confinement for reasons other than discipline; no provision for the allowance of gain-time to a prisoner who performs his assignments in a conscientious manner over and above that which may normally be expected of him; nor any provision for the allowance of gain-time to a prisoner who performs some outstanding deed. To summarize, the only gain-time allowances provided in the old

statute are set forth in subsection (1)(a), (b), and (c) in the fixed amounts of 5-10-15 as above stated.

In comparison, the new gain-time statute challenged in this proceeding, while reducing the fixed amount of calendar statutory gain-time from 5-10-15 to 3-6-9, by virtue of additional provisions provides opportunity for a greater accumulation of gain-time than did the old statute. For example, the new statute at subsection (2)(b) authorizes the grant of additional gain-time allowances on a monthly basis, as earned, up to one day for each day of productive or institutional labor performed by any prisoner who has committed no infraction of the rules or laws of the State. This is popularly known as the work gain-time statute and was enacted for the purpose of

encouraging good behavior of prisoners participating in work-release programs. The old gain-time statute had no provision for the accumulation of work gain-time.

The new statute at subsection (2)(e) permits the accumulation of up to six days per month for any inmate who, because of age, illness, infirmity, or confinement for reasons other than discipline, does not participate in a correctional work program. This means that a prisoner who is unable to participate in a work release program can still accumulate gain-time. No comparable provision is found in the old statute.

The new statute at subsection (3)(a) permits the accumulation of gain-time by a prisoner who performs the assignments given to him in a conscientious manner

over and above that which may normally be expected of him where no disciplinary report has been filed against such prisoner within the preceding six months. This particular subsection also permits the accumulation of gain-time by a prisoner "who diligently participates in an approved course of academic or vocational study." The quoted language means that a prisoner may accumulate gain-time while participating in an educational program. However, the old statute as it stood at the time of petitioner's conviction had no comparable provision. Interestingly, the legislature with the passage of Ch. 76-273, Laws of Florida 1976, added subsection (3) to the old statute which specifically excluded the allowance of gain-time for participation in academic classroom instruction. *See* § 944.27, F.S.

(1977).

The new statute at subsection (3)(b) authorizes the granting of gain-time to a prisoner who performs some outstanding deed or service. The old statute, §944.27, contains no comparable provision. Thus, it becomes obvious that under the old statute at subsection (1)(c) the most gain-time that petitioner could accumulate was fifteen days per month during the fifth and subsequent years of his sentence. Under the new statute at subsection (1)(c), petitioner may accumulate nine days gain-time per month during the fifth and succeeding years of his sentence; in addition thereto, he may accumulate up to fifteen days per month work gain-time under the provisions of subsection (2)(b). However, if petitioner, because of illness or other infirmity, is unable to

participate in a correctional work program, he still can accumulate up to six days gain-time per month when he demonstrates a constructive utilization of time and has committed no infraction of the rules or laws of the State. Under subsection (3)(a), petitioner may accumulate up to six days per month extra gain-time just for diligently participating in an approved course of academic or vocational study. Under subsection (3)(b) of the new statute, petitioner can be granted special gain-time from 1 to 60 days. Simple arithmetic shows that petitioner's opportunity for the accumulation of gain-time under the new statute far surpasses that which he could have earned under the old statute. It is obvious that the new statute is a legislative attempt to remedy some of the inequities of the old statute

looking toward the ultimate goal of rehabilitation of the prisoner. The new statute encourages industry because of the opportunities it affords for the accumulation of gain-time whether same be termed statutory, work, or discretionary gain-time. Under the old statute, the maximum amount of gain-time that could be earned was fixed and all any prisoner had to do in order to be credited with the appropriate amount of gain-time at the end of each month was to stay out of trouble. This encourages laziness and discourages prisoner industry and initiative. In summary, the new statute is remedial; it is procedural; and it is ameliorative. The applicable rule was well stated by this Court in *Dobbert:* "It is axiomatic that for a law to be *ex post facto* it must be *more onerous* than the prior law." 53 L.Ed.2d at 357.

It is repeatedly urged in petitioner's brief that the other provisions of the new statute, to-wit: the monthly earning provision and the extra gain-time provisions provided for in subsections (2)(b)-(3)(b) are "not material" (petitioner's brief, p. 5; n. 7 at p. 9) and "of no consequence." (petitioner's brief, p. 6) This attempt to separate portions of a comprehensive piece of remedial legislation is a tacit admission that if the statute is analyzed in its entirety, as it should be, *State ex rel. Boyd v. Green*, 355 So.2d 789 (Fla. 1978), then the assumption contained within the "Question Presented" (petitioner's brief, p. 3), essential to petitioner's case, that the new statute reduces substantially the right to acquire gain-time, must fail. Of course, petitioner cannot admit that he has an

opportunity to earn more gain-time under the procedural requirements of the new statute because if he does, then he cannot prevail on his *ex post facto* claim. *Dobbert v. Florida, supra.* The best evidence that a prisoner can accumulate more gain-time under the new statute than the old is that numerous prisoners have sought and obtained mandamus orders to recompute their gain-time under the new statute. Illustrative of this type of order[2] is the one entered in *Storm v. Massey,* No. 00-128 (Fla. 1st DCA, 1979), not reported. Query: would prisoners seek this type of relief if they were of the opinion it would result in a loss of gain-time? We think not.

Petitioner notes that this proceeding

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[2] The order (formal parts omitted) is reproduced in the appendix to this brief.

is not a class action. While this is true, should this Court conclude that gain-time is in some way related to the punishment annexed to the crime and that the change wrought by the new statute constitutes *ex post facto* legislation, then under Florida's constitution work gain-time and any other gain-time awarded under § 944.275 to prisoners convicted prior to its enactment would be lost. *See* FLA.CONST. art.X, § 9. This impact is clearly understood by counsel for petitioner. See petitioner's brief, p. 6, n.6.

The schematics presented on p. 7 of petitioner's brief is interesting more for what it does not show than what it does. Petitioner wants this Court to believe that the passage of the new statute materially altered his position to

his disadvantage. Then we wonder why no allegation is found in petitioner's brief showing the total amount of gain-time earned subsequent to July 1, 1978 and particularly the amount of gain-time, exclusive of statutory gain-time, that he has earned since that date. Could it be--could it just be--that petitioner really isn't interested in furnishing the Court with this information? After all, if the Court had this information, it might conclude that the application of the new statute did not work to the *material* disadvantage of petitioner. It is even possible the Court might conclude that petitioner has accumulated gain-time under the new statute that he could never have acquired under the old. The simple truth is that the new statute has placed petitioner in a materially better position

than he was prior to the time of its passage. This is so because a reading of the statutes will reveal that benefits inuring to petitioner under the new statute could not have been had under the old statute.

THE EX POST FACTO CLAIM

It is appropriate to begin the discussion of this issue by pointing out that petitioner is incarcerated pursuant to a lawful judgment and sentence which he does not attack. *See United States v. Addonizio*, 442 U.S. 178, 68 L.Ed.2d 805, 99 S. Ct. 2235 (1979); *Banks v. State*, 342 So.2d 469 (Fla. 1976). It must be admitted that lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a "retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334

U.S. 266, 285, 92 L.Ed. 1356, 68 S.Ct. 1049 (1948). This is not to say that a prisoner is wholly stripped of constitutional protections when imprisoned for crime. Far from it! But the fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the system to which they have been lawfully committed. *Cf. CSC v. Letter Carriers,* 413 U.S. 548, 37 L.Ed.2d 796, 93 S.Ct. 2880 (1973); *Parker v. Levy,* 417 U.S. 733, 41 L.Ed.2d 439, 94 S.Ct. 2547 (1974); *Broadrick v. Oklahoma,* 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973). It is in this posture that petitioner's claim of a deprivation of unearned gain-time must be viewed. Stated another way, petitioner claims that § 944.275, F.S. (1979), deprives him of a

constitutionally protected liberty interest in unearned gain-time.

An *ex post facto* claim was raised in *Trantino v. Department of Corrections*, 402 A.2d 947 (N.J.Super.Ct. 1979). It was urged that the Department of Corrections' action in changing Trantino's best estimated parole eligibility date offended the constitutional prohibition against the imposition of *ex post facto* laws. In refuting this claim, the New Jersey court remarked as follows:

> "Trantino had no vested right in the September 1977 BEPED and the fact that it was subsequently changed does not present an issue of constitutional magnitude requiring our interference. As Judge Goldmann so aptly observed in *Zink v. Lear, supra,*
>
> > Parole presents a question of statutory construction; no constitutional right is involved. * * * Parole is a matter of legislative grace and not a thing of right. * * * Parole may be granted or withheld, as the legislative discretion may impel. When sentence is imposed upon a defendant, there is no constitutional guaranty that the provisions regarding parole will remain constant; the only constitutional inhibition is

> that no law may be passed increasing the punishment for the crime committed. * * * The changes effected by the 1948 Parole Act and its amendments imposed no new penalty nor did they increase the sentence for the crime. The act simply changed the procedure of administering parole and bears none of the elements requiring condemnation as abrogating the prisoner's constitutional rights. [28 N.J.Super. at 524-525, 101 A.2d at 77; citations omitted]
>
> See also, *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed. 2d 344 (1977); *DiMiceli v. State Parole Board*, 29 N.J.Super.80, 101 A.2d 580 (App.Div. 1953), aff'd o.b. 15 N.J. 446, 105 A.2d 525 (1954)."

Id. at 951, 952.

In *Singleton v. Shafer*, 313 F.Supp. 1094 (E.D.Pa. 1970), it was urged that the statute which repealed the so-called "good time" statute in Pennsylvania violated the prisoners' constitutional rights because it was a bill of attainder. Judge Luongo addressed the issue as follows:

> "Commonwealth ex rel. Banks v. Cain, *supra*. Commutation under the 'good-time' statute ultimately depended upon the exercise of the Governor's discretion; it was a matter of executive grace. There was no vested right in having a sentence reduced even if all other conditions set forth in the statute had been fulfilled, i.e., good behavior and approval of the board of inspectors. See United States ex rel. Forino v. Garfinkel, 166 F.2d 887 (3d Cir. 1948); In re Raymond, 110 F. 155 (E.D.Pa.1901). The statute merely set forth a particular ground for executive clemency. Since a prisoner was subject to the maximum sentence and commutation was solely a matter of executive grace, there was and is no vested right in the continuing existence of the statute. Under these circumstances repeal of the statute did not constitute imposition of punishment without a judicial trial nor did it constitute an *ex post facto* law inflicting greater punishment. See United States ex rel. Forino v. Garfinkel, *supra*."

Id. at 1095, 1096. *See also Graham v. Thompson*, 246 F.2d 805 (10th Cir. 1957).

Petitioner adroitly points out that

Graham v. Thompson, supra, was viewed with disfavor by the Third Circuit in *Geraghty v. United States Parole Commission,* 579 F.2d 238, 266, n. 136 (3rd Cir. 1978). This is of no consequence because *Gerahty* cannot be read as supportive of petitioner's contention that he has a constitutionally protected liberty interest in unearned gain-time. In fact, respondent knows of no decision by this Court or any other court that has held that a prisoner has a constitutionally protected liberty interest in, not gain-time already earned and thus vested, but in an expectancy of earning such gain-time in the future.

In a somewhat similar context, this Court pointed out in *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 60 L.Ed.2d 668, 676, 99 S.Ct. 2100 (1979), that "[t]here is a crucial distinction between being

deprived of a liberty one has, as in parole and being denied a conditional liberty that one desires." The Court further commented that a prisoner has no constitutional right to be conditionally released before the expiration of a valid sentence. Of course, any prisoner has a natural desire to be released from prison. He didn't want to go there in the first place. But his conviction with all its procedural safeguards has extinguished that liberty right. In other words, the prisoner's desire to be conditionally released does not constitute a constitutionally protected liberty interest. *Meachum v. Fano*, 427 U.S. 215, 224, 49 L.Ed.2d 451, 96 S.Ct. 2532 (1977).

Just as there is a difference between an initial grant of parole and the revocation of that parole, there is a

difference between the right or opportunity to earn gain-time conditioned on good behavior and the revocation or forfeiture of such gain-time already earned and credited to a prisoner. This distinction is pointed out in *United States ex rel. Bey v. Connecticut Board of Parole*, 443 F.2d 1079, 1086 (2d Cir. 1971), as follows:

> "It is not sophistic to attach greater importance to a prisoner's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom."

Similarly, and with equal logic, it can be said that a prisoner's right to retain gain-time already earned so long as he abides by the rules of the institution in which he is incarcerated is of much greater importance than his mere anticipation or hope of earning gain-time in the future. As Judge Friendly cogently noted: "[T]here

is a human difference between losing what one has and not getting what one wants." *Friendly, Some Kind of Hearing,* 123 U.Pa. L.Rev. 1267, 1296 (1974). It is emphasized that petitioner does not complain of being deprived of gain-time already earned but objects to being deprived of his hope of earning a given amount of gain-time in the future.

In determining whether due process requirements are applicable to petitioner's claimed deprivation of a liberty interest, it is believed this Court must look not to the weight but to the nature of the interest at stake. *Board of Regents v. Roth,* 408 U.S. 564, 570-571, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972). Under the old statute, respondent held out the possibility, the hope, of earning gain-time in the future at a given rate. But this

is nothing more than a mere hope or expectation that such gain-time can be earned. *Cf. Board of Regents v. Roth, supra,* 408 U.S. at 577. To that extent, petitioner's general interest in the accumulation of unearned gain-time is no more substantive than his hope that he will not be transferred to another prison, a hope which is not protected by due process. *Meachum v. Fano,* 427 U.S. at 225. While *Greenholtz* deals with a protected liberty interest in a parole context, the Court's opinion clearly points up the distinction respondent makes herein, i.e., the difference between being deprived of gain-time a prisoner has already earned and being denied the hope or possibility of earning gain-time in the future. In fact, however, the new statute, as previously emphasized, affords petitioner the very

real opportunity of earning a greater amount of gain-time than he could have earned under the old statute. In a similar context, the Fifth Circuit in *Brown v. Lundgren*, 528 F.2d 1050, 1053, (5th Cir. 1976), pointed out that parole revocation and prison discipline are clearly within the ambit of the Due Process Clause of the Fifth and Fourteenth Amendments. But with equal emphasis the court stated that "the mere expectation of parole release while in otherwise lawful custody is not so vested as to result in a 'grievous loss' if denied by the Parole Board." The applicability of this principle *sub judice* is inescapable: petitioner's *expectation* of earning gain-time at a given rate is not so vested as to result in a grievous loss when, as he claims, it is denied by the enactment of a new statute.

This Court's decision in *Wolff v. McDonnell*, 418 U.S. 539, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974), is informative. There, the Court held that federal courts may consider the validity of procedures for *depriving prisoners of good-time credits* and may, short of ordering the actual restoration of good-time already cancelled, fashion appropriate remedies for any constitutional violations. The primary concern of the Court was the protection against loss of good-time already earned because of a prisoner's major or serious misconduct. The Court noted that, although the Constitution does not guarantee good-time credit for satisfactory behavior while in prison, it emphasized that the State had provided a statutory right to good-time but also specified it was to be forfeited only for serious

misbehavior. 418 U.S. at 557. Thus, the State having created the right to good-time and recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest is sufficiently embraced within the Fourteenth Amendment "liberty" to entitle him to minimum due process protection to ensure that the state-created right is not arbitrarily abrogated. 418 U.S. at 557. The Court is here speaking to the possibility of arbitrary forfeiture of good-time credits without requisite due process protection. The following language highlights the Court's intent that the minimum requirements of procedural due process be observed before a Nebraska prisoner is deprived of good-time credits for serious misconduct:

> "Since petitioners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination

> of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed."

418 U.S. at 558. Respondent agrees that before a prisoner can be deprived of good-time already earned because of serious misconduct, minimum due process standards must be observed because the prisoner has a protectible Fourteenth Amendment liberty interest in such gain-time already earned. Florida law protects prisoners against the arbitrary forfeiture of gain-time without the observance of minimum due process. *See* § 944.28, F.S. (1979). For additional holdings that a prisoner does not have a protectible liberty interest in a future parole release, *see Sharp v. Leonard*, 611 F.2d 136 (6th Cir. 1979); *Jackson v. Reese*, 608 F.2d 159 (5th Cir. 1979). In this

connection, if petitioner is heard to argue that the cases relied on by respondent are not necessarily *ex post facto* cases, then the following quoted from the opinion in *Jackson* may be of interest:

> "The threshold question under § 1983 is whether the complainant has been deprived of a cognizable liberty or property interest. The Supreme Court has held that the denial of parole, as distinguished from the revocation of parole, does not amount to a loss of liberty in the due process context. *Greenholtz v. Nebraska Penal Inmates*, ___ U.S. ___, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979); *Brown v. Lundgren*, 528 F.2d 1050 (5th Cir. 1976), *cert. denied*, 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed.2d 283. Since appellant has not shown a deprivation of a constitutionally protected interest, this Court need not address whether the Georgia Parole Board's procedures comport with due process. *Id.* at 1053."

Id. at 160. It is the position of respondent that since petitioner has not shown any deprivation of a constitutionally protected liberty interest, the Court need

not address the issue of whether Florida's new gain-time statute now under attack constitutes *ex post facto* legislation.

The teaching of the cases seems to be that federal courts have been willing to find a liberty interest once a prisoner has regained his freedom even though that freedom is subject to revocation and circumscribed by conditions of parole. *Morrissey v. Brewer*, 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972). But this Court has been generally reluctant to find a constitutionally protected liberty interest while a prisoner is still under actual confinement, *Winsett v. McGinnes*, 617 F.2d 996, 1004 (3rd Cir. 1980), *en banc*, and has done so only in those cases where a prisoner has been deprived of a valuable interest already earned without the protection of

procedural due process.

Petitioner relies heavily on *Greenfield v. Scafati*, 277 F.Supp. 644 (D.Mass. 1967), *aff'd*, 390 U.S. 713, 20 L.Ed.2d 150, 88 S.Ct. 1409 (1968), and urges that it should be controlling in the instant case (petitioner's brief, p. 53). Respondent disagrees. The result reached in *Greenfield* was based on a construction of Massachusetts law under which the availability of good conduct deductions is considered an essential element of the sentence. At the time Greenfield was sentenced, a Massachusetts statute granted him the right to earn good conduct deductions from his sentence and provided for forfeiture of good-time credits for various reasons, not including parole violations. Greenfield was released on parole and later reincarcerated for violation of

parole. Subsequent to the time Greenfield was initially sentenced, a statute was passed providing that where a prisoner had violated his parole and was returned to a correctional institution therefor, he was not to receive deductions for good-time for any of the first six months following his return. The court properly found that the statute constituted an *ex post facto* law as applied to Greenfield. *Greenfield* simply struck down a statute passed after his initial conviction which deprived parole violators of accumulated good-time upon their return to prison. There can be no question but that this statute constituted *ex post facto* legislation when applied to Greenfield because it materially altered the situation to his disadvantage. The statute struck down in *Greenfield* attached a penalty for

parole violation that was not in effect at the time of the original sentence. This had the effect of lengthening the original sentence because under Massachusetts law the availability of good conduct deductions was considered an element of the sentence. This simply isn't the situation this Court is confronted with in the instant proceeding. Under Florida law, the opportunity to earn gain-time after incarceration is no part of the original sentence imposed on a prisoner.

The Louisiana case law cited in petitioner's brief is equally inapposite. For example, *State v. Curtis*, 363 So.2d 1375 (La. 1978), and other Louisiana cases are clearly distinguishable from the issue presented *sub judice*. In *Curtis*, the court pointed out that the statute there

under attack applied a new punitive measure to the crime already consummated to the detriment or material disadvantage of the wrongdoer. The statute here under attack has no relation to sentencing and does not apply any punitive measure to a crime already consummated to petitioner's detriment or material disadvantage. As stated by the Florida Supreme Court in *Harris v. Wainwright*, 376 So.2d 855 (Fla. 1979):

> "Under either the old law or the new, gain time, whether it be what is normally considered 'statutory' or 'extra', only comes into play if a given inmate conducts himself in such a way as to deserve the gain time. Therefore, any notion of gain time can only be considered, at best, as conditionally vested."

Id. at 856. To reiterate, whatever statute was in effect at the time petitioner committed the crime for which he

was sentenced, the good-time allowances provided therein were not part of his sentence and thus not a part of the law annexed to the crime when committed. Respondent has found no authority, respectable or otherwise, holding that a prisoner has a constitutionally protected liberty interest in unearned gain-time. Petitioner has been deprived of nothing but, in fact, with the passage of the new gain-time statute, has been given the opportunity of accumulating a greater amount of gain-time than he could have done under the old statute.

CONCLUSION

The order of the Florida Supreme Court denying petition for writ of habeas corpus should be affirmed.

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APPENDIX

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944.012 Legislative intent.--The Legislature hereby finds and declares that:

(1) Florida spends each year in excess of $60 million for its state correctional system but Florida citizens have not received a fair return on that investment. Florida correctional institutions have contributed little to the reduction of crime. To the contrary, crime rates continue to rise; recidivism rates are notoriously high; and large prisons have for the most part become schools for crime, making successful reintegration into the community unlikely.

(2) It is clear that major changes in correctional methods are required. It is essential to abate the use of large institutions and continue the development of community-based corrections; to equip judges with more effective evaluative tools to deal with the criminal offender; and to provide alternatives to institutionalization, including the availability of probationers' residences and community correctional centers.

(3) One of the chief factors contributing to the high recidivism rate in the state is the general inability of ex-offenders to find or keep meaningful employment. Although 90 percent of all offenders sent to prison return to society one day, the correctional system has done little to provide the offender with the vocational skills

he needs to return to society as a productive citizen. This failure virtually guarantees the probability of return to crime. Vocational training and assistance in job placement must be looked to on a priority basis as an integral part of the process of changing deviant behavior in the institutionalized offender, when such change is determined to be possible.

(4) These changes must not be made out of sympathy for the criminal or out of disregard of the threat of crime to society. They must be made precisely because that threat is too serious to be countered by ineffective methods.

(5) In order to make the correctional system an efficient and effective mechanism, the various agencies involved in the correctional process must coordinate their efforts. Where possible, interagency offices should be physically located within major institutions and should include representatives of the Florida State Employment Service, the vocational rehabilitation programs of the Department of Health and Rehabilitative Services, and the Parole and Probation Commission. Duplicative and unnecessary methods of evaluating offenders must be eliminated and areas of responsibility consolidated in order to more economically utilize present scarce resources.

(6) It is the intent of the Legislature:

(a) To provide a mechanism for the early identification, evaluation, and treatment of behavioral disorders of adult offenders coming into contact with the correctional system.

(b) To separate dangerous or repeat offenders from nondangerous offenders, who have potential for rehabilitation, and place dangerous offenders in secure and manageable institutions.

(c) When possible, to divert from expensive institutional commitment those individuals who, by virtue of professional diagnosis and evaluation, can be placed in less costly and more effective environments and programs better suited for their rehabilitation and the protection of society.

(d) To make available to those offenders who are capable of rehabilitation the job-training and jobplacement assistance they need to build meaningful and productive lives when they return to the community.

(e) To provide intensive and meaningful supervision for those on probation so that the condition or situation which caused the person to commit the crime is corrected.

944.275 Gain-time.--

(1) The department shall grant the following deductions for gain-time on a monthly basis, as earned, from the sentence of every prisoner who has committed no infraction of the rules of the department or of the laws of the state and who has performed in a satisfactory and acceptable manner the work, duties, and tasks assigned, as follows:

(a) Three days per month off the first and second years of the sentence;

(b) Six days per month off the third and fourth years of the sentence; and

(c) Nine days per month off the fifth and all succeeding years of the sentence;

and the prisoner shall be entitled to credit for a month as soon as the prisoner has served such time as, when added to the deduction allowable, would equal a month.

(2)(a) It is the intent of the Legislature that work programs be recognized as an integral part of the rehabilitative process and that gain-time under this section be awarded only if earned as provided herein.

(b) The department is authorized to grant additional gain-time allowances on a monthly basis, as earned, up to 1 day for each day of productive or institutional labor performed by any prisoner who has committed no infraction of the rules of the department or of the laws of this state and who has accomplished

in a satisfactory and acceptable manner, the work, duties, and tasks assigned. Such gain-time allowances under this section shall be awarded on the basis of diligence of the inmate, the quality and quantity of work performed, and the skill required for performance of the work.

(c) The amount of time in a work program equivalent to 1 day shall be determined by the department. The department may provide for the award of gain-time under this subsection on a fractional basis for less than 1 day's participation in work programs.

(d) Any prisoner who, without approval, refuses or neglects to perform the work, duties, and tasks assigned in the correctional work program shall forfeit gain-time as provided in s. 944.28.

(e) The department may grant additional gain-time allowances up to 6 days per month for any inmate who, because of age, illness, infirmity, or confinement for reasons other than discipline, does not participate in a correctional work program, who demonstrates a constructive utilization of time, and who has committed no infraction of the rules of the department or the laws of the state. However, no prisoner shall receive additional gain-time credits under both paragraph (b) and this paragraph during the same month.

(3)(a) An inmate who faithfully performs the assignments given to him in a conscientious manner over and above that which may normally be expected of him, against whom no disciplinary report has been filed within the preceding 6 months, and whose conduct, personal adjustment, and individual effort towards his own rehabilitation show his desire to be a better than average inmate or who diligently participates in an approved course of academic or vocational study may be granted, on an individual basis, from 1 to 6 days per month extra gain-time to be deducted from the term of his sentence.

(b) An inmate who does some outstanding deed, such as the saving of a life or assisting in recapturing an escaped inmate, or who in some other manner performs an outstanding service that would merit the granting of additional deductions from the term of his sentence, may be granted special gain-time on the basis of from 1 to 60 days.

(4) When a prisoner is under two or more concurrent sentences, the prisoner shall be allowed gain-time as if such sentences were all one sentence; and the prisoner's gain-time, including any additional gain-time allowed under subsection (2) and extra gain-time allowed under subsection (3), shall be subject to forfeiture as though such sentences were all one sentence.

(5) No gain-time shall be awarded except as provided in this section.

944.27 Gain-time for good conduct; schedule of allowances; cumulative sentences to be treated as one sentence for purposes of allowing and forfeiting.--

(1) The [Department of Offender Rehabilitation] shall grant the following deductions for gain-time from the sentences of every prisoner who has committed no infraction of the rules or regulations of the [department], or of the laws of the state, and who has performed in a faithful, diligent, industrious, orderly, and peaceful manner the work, duties, and tasks assigned to him, to wit:

(a) Five days per month off the first and second years of his sentence;

(b) Ten days per month off the third and fourth years of his sentence; and

(c) Fifteen days per month off the fifth and all succeeding years of his sentence; and he shall be entitled to credit for a month as soon as he has served such time as, when added to the deduction allowable, would equal a month.

(2) When a prisoner is under two or more cumulative sentences, he shall be allowed gain-time as if they were all one sentence and his gain-time, including any extra gain-time allowed him under s. 944.29, shall be subject to forfeiture as though such sentences were all one sentence.

O R D E R

The Petition for Writ of Habeas Corpus is treated as a Petition for a Writ of Mandamus and is granted. The Department of Corrections is directed to compute the petitioner's gain time from July 1, 1978, under Section 944.275, Florida Statutes (Supp. 1978).

By order of the Court this 2nd day of August, A.D., 1979, Chief Judge E.R. Mills, Jr., Judge Richard W. Ervin, III and Judge Anne C. Booth.

RAYMOND E. RHODES, CLERK

Supreme Court, U. S.
FILED
OCT 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-5780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HOYT WEAVER, *Petitioner,*

v.

ROBERT GRAHAM, GOVERNOR OF FLORIDA, *Respondent.*

On Writ Of Certiorari To The Supreme Court Of Florida

REPLY BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-5780

HOYT WEAVER, *Petitioner,*

v.

ROBERT GRAHAM, GOVERNOR OF FLORIDA, *Respondent.*

On Writ Of Certiorari To The Supreme Court Of Florida

REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

No reply is required to the non-argument portions of the brief of respondent other than to observe that manifestly no provision of the Florida Constitution is

now relevant. (*cf.* Resp. Brief 2). The argument of respondent, in fact, not only is unresponsive to the sole issue presented by the Florida statute in question, but represents an abrupt alteration of the position of the State of Florida in the Supreme Court of Florida in this case as well as in other matters now pending in other forums. Response to this altered position is made under appropriate topical headings, and no additional summary of argument appears essential. The same terms of reference used in the main brief of petitioner will be used here.

ARGUMENT

Adoption Of Section 944.275, Florida Statutes Cannot Be Construed As A Mere Prospective Procedural Change Or As Affording Ameliorative Relief

In his brief respondent asserts that Section 944.275, Florida Statutes (1979) is prospective in operation, is a mere remedial or procedural change, and is ameliorative is nature. In so arguing, respondent devotes little, if any, attention to his "act of grace" argument espoused before and adopted by the Supreme Court of Florida. In any event, the latest assertions also lack foundation in law or in fact.

Retrospective Operation

Respondent initiates his argument with the flat observation that Section 944.275 "does not operate retrospectively" (Resp. Brief 15). Presumably, this claim is premised on the fact that the statute did not operate

to take away gain-time already earned before the effective date. This argument, although not directly advanced by respondent below,[1] was anticipated and refuted by petitioner (Pet. Brief 59-62). Respondent makes no effort to respond to the contentions of petitioner in this respect. Respondent fails to suggest why the second statute is not "aimed at past acts and not future acts." *Cummings* v. *Missouri*, 4 Wall. 277, 327 (1867). Most significantly, respondent fails to controvert the reliance by sentencing judges on existing gain-time statutes (Pet. Brief 60).

Lack of Remedial or Procedural Effect

Respondent next contends that the gain-time statute is remedial or procedural in effect and thus does not fall within *ex post facto* restrictions (Resp. Brief 10, 16 *et seq.*). No effort is made to demonstrate that the gain-time statute is within that category other than to cite an irrelevant preamble to a statute adopted 21 years before

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[1] Doubtless it was not advanced below because *Lee* v. *State*, 294 So.2d 305 (Fla. 1974) *overruled on other grounds*, 340 So.2d 474 (Fla. 1976) held that a statute restricting parole could not be applied to crimes committed prior to its effective date. In commenting on *Lee* in another section of his brief (pages 4 and 5) respondent fails to present any meaningful distinction applicable here. The new position of respondent also ignores the definition of a retroactive or retrospective law, which is recognized in Florida as one, *inter alia*, which "attaches a new disability in respect to transactions or considerations already past." *Heberle* v. *P.R.O. Liquidating Co.*, 186 So.2d 280, 282 (Fla. 1st DCA 1966) (footnote omitted).

the statute in question. Respondent also offers the bald assertion that the prohibition against *ex post facto* laws "applies only to changes in substantive law and not to changes in procedure." (Resp. Brief 10) This Court has addressed and rejected that argument:

> "[C]an any substantial right which the law gave the defendant at the time to which his guilt relates, be taken away from him by *ex post facto* legislation because, in the use of a modern phrase, it is called a law of procedure? We think it cannot."

Kring v. *Missouri*, 107 U.S. 221, 232 (1883).

That the statute with which this cause is concerned cannot be regarded as procedural is illustrated by a pronouncement by this Court quoted by respondent. In *Hopt* v. *Utah*, 110 U.S. 574 (1884) (cited at Resp. Brief 17, 18), the Court held that the statute in issue was not *ex post facto* because the punishment prescribed for the crime "remained unaffected by the subsequent statute." (110 U.S. at 589-590) In the present case petitioner's punishment is indisputably affected, and is affected to his material disadvantage. Thus, Section 944.275, Florida Statutes (1979) clearly runs afoul of the *ex post facto* prohibition when applied to petitioner and cannot rationally be treated as a mere procedural change.

In an effort to support the "procedural" argument, respondent has fallen back to the position that the Florida gain-time statute is not part of "the law annexed to the crime, when committed" in the words of *Calder* v. *Bull*, 3 Dall. 386, 390 (1798). In so arguing, respondent deals with only *one* of the four *ex post facto* tests

articulated by this Court and previously summarized by petitioner (Pet. Brief 30-31). The pertinent cases establish that a law is *ex post facto* when it imposes greater punishment than that specified by statutory provisions in effect at the time of the commission of the offense, when it has effects similar to those in the first category, when it alters the situation of the defendant to his disadvantage or when it imposes unpleasant consequences upon the defendant for prior conduct. Respondent similarly summarizes the law (*cf.* Resp. Brief 9, 11).

Accepting, *arguendo*, the limited basis of his argument, the respondent fails to offer a convincing reply even on the one test. Respondent, in fact, acknowledges that gain-time "often has the effect of determining how much of [the] sentence must be spent within the confines of the prison" (Resp. Brief 5-6), but insists that a statute under which a prisoner may earn gain-time as an award for good conduct is not part of "the law annexed to the crime." Respondent apparently cites *Stephens* v. *Conley*, 138 P.189 (Mont. 1914) in support of that conclusion (Resp. Brief 8). To the extent that case so holds, it must be deemed to have been overruled *sub silentio* by *State* v. *Ellsworth*, 380 P. 2d 886 (Mont. 1963), which expressly adopts the majority view in the United States that "[t]he good time law then in effect at the time the offense was committed 'enters into the judgment as if written therein.' " *Id.* at 888.

In any event, the argument carries no weight in the case of loss of gain-time credits for a punishment "which affects the term of confinement." *Wolff* v.

McDonnell, 418 U.S. 539, 547 (1974). "[A]n increase in the possible penalty is *ex post facto*, . . . since the measure of punishment prescribed by the later statute is more severe than that of the earlier. . . ." *Lindsey* v. *Washington*, 301 U.S. 397, 401 (1937). To the extent that the second statute has the effect of lengthening time served in prison, however, "regardless of the length of the sentence actually imposed," it constitutes "an increase in the possible penalty" which must be *ex post facto*. *Id.*

No authority is offered for the implied proposition that the gain-time statute must be literally "annexed" in the sense of actual incorporation or placement in a physically immediate location in the statutory scheme. However, the gain-time statute in question and the second degree murder statute were both present in Florida Statutes (1975) and were simultaneously adopted in the comprehensive biennial revisor's bill set forth in Section 11.2421, Florida Statutes (1975) (Chapter 75-169, Laws of Florida) (*see also*, Note, *Sketch of the Evolution of Florida Law*, 3 U.Fla. L.Rev. 74, 77-80 (1950)).

Absence of Ameliorative Effect

Respondent raises for the first time his argument that Section 944.275, Florida Statutes (1979) (the second statute) does not alter the situation of the petitioner to his disadvantage and is, therefore, ameliorative. This contention is utterly without merit and can be supported only by a distorted reading of Florida's statutory scheme.

Respondent claims that "the only gain-time allowances provided in the old statute [Section 944.27, Florida Statutes (1975)] are set forth in subsection (1)(a), (b) and (c) in the fixed amounts of 5-10-15 as above stated." (Resp. Brief 19-20) In addition, respondent states "that under the old statute at subsection (1)(c) the most gain-time that petitioner could accumulate was fifteen days per month during the fifth and subsequent years of his sentence." (Resp. Brief 23) These statements are, at the very least, highly misleading. In making these statements, respondent totally ignores both Section 944.29, Florida Statutes (1975), (Pet. Reply Brief A 2a) which expressly provided "in addition to time credits, an extra good-time allowance for meritorious conduct or exceptional industry," and Section 945.21, Florida Statutes (1975) (Pet. Reply Brief A 2a), which authorizes the adoption of administrative rules relating to gain-time. Therefore, the first statutory scheme did, in fact, authorize the grant of extra gain-time for meritorious conduct or exceptional industry. In addition, administrative rules and regulations contained in the Florida Administrative Code implementing Section 944.29 (Pet. Reply Brief A 4a) were in effect both at the time petitioner was convicted (May 13, 1976) and at the time he allegedly committed the offense he was charged with (January 31, 1976).[2] These rules and regulations,

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[2] *See* brief of petitioner at 3. Respondent, at page 18 of his brief, compares the "new statute" with the "old statute" in effect at the time petitioner was convicted. (In his main brief, petitioner utilized the terms "first statute" and "second statute." When responding

relevant portions of which are reproduced in the appendix to this brief, contain provisions directly analogous to the statutory provisions enumerated and described by respondent (Resp. Brief 19-25).

A comparison of these pertinent rules and regulations with corresponding provisions of the statutes cited by respondent demolishes the argument of respondent. Rule 10B-20.03 (Pet. Reply Brief A 4a) provided one to six days per month extra gain-time for an inmate who faithfully performs assignments in a manner over and above that which would normally be expected of him, just as does Section 944.275(3)(a) (1979), wrongly claimed by respondent to be a dramatic new penal reform. Rule 10B-20.04 (1) (Pet. Reply Brief A 5a) authorized special gain-time of one to fifteen days per month for an inmate who is assigned to work at a building construction project authorized by the Department of Health and Rehabilitative Services; this Rule is similar to Section 944.275(2)(b) in providing work gain-time.[3] Section 944.275(3)(b) duplicates, almost verbatim, Rule 10B-20.04 (2) (Pet. Reply Brief A 5a) in rewarding an in-

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to respondent's arguments, both types of terminology are used.) Because the "old" statute and the rules and regulations referred to in this reply brief all were in existence at the time of conviction and at the time the offense allegedly occurred, petitioner has no quarrel with the point of reference chosen by respondent for purposes of his argument that the new statute is ameliorative.

[3] Respondent admits that this new statute permits only a maximum of fifteen (15) days work gain-time, apparently by administrative construction (Resp. Brief 23).

mate who does some outstanding deed with special gain-time of one to sixty days.[4] Consequently, Section 944.29, Florida Statutes (1975) and the rules implementing that section make it abundantly clear that, contrary to respondent's assertion at page 23 of his brief, an inmate could accumulate gain-time over and above the statutory gain-time provided by Section 944.27, Flordia Statutes (1975).

Even if the cited rules and regulations did not exist, Chapter 944, Florida Statutes (1975), when petitioner was convicted, afforded an inmate the opportunity to earn gain-time in excess of statutory gain-time pursuant to Section 944.29, Florida Statutes (1975). In fact, because this statute did not contain any limits on the amount of extra gain time allowable thereunder for meritorious conduct or exceptional industry, the enforcing authority actually had broader discretion than it has under Section 944.275, Florida Statutes (1979) in its present form.

A comparison of Chapter 944 as it exists now with Chapter 944 and its accompanying rules and regulations

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[4] The claims of respondent relating to time granted by the new statute for attending school or for disability are equally without merit for three or more reasons: (1) it is apparent that petitioner would be required to attend classes, an act not required by the old statute; (2) such credits were administratively allowable under the generalized provisions of Rules 10B-20.03 and 10B-20.4; and (3) there is nothing in the record to suggest that petitioner is disabled or has the skill or ability to meaningfully engage in educational pursuits.

as it existed when petitioner was convicted reveals no dramatic change in the basic statutory scheme with regard to gain-time other than the reduction of statutory gain-time. It is apparent that subsections 2 and 3 of Section 944.275, Florida Statutes (1979), providing extra gain-time, codify previously existing rules and regulations and add other provisions which previously were within the discretion of the appropriate administrative agency under Section 944.29, Florida Statutes (1975). This conclusion is supported by Chapter 78-304 of the Laws of Florida. (Pet. Brief A6a) Chapter 78-304, while creating Section 944.275, concurrently repealed Section 944.29, resulting in the creation of an all-inclusive gain-time statute,[5] Section 944.275, which affords no discretion beyond its own terms to the Department of Corrections with regard to the allowance of gain-time.

It is apparent that respondent has failed to recognize that Section 944.29, Florida Statutes (1975) (with implementing rules) existed concurrently with Section 944.27, Florida Statutes (1975). Respondent claims at page 24 of his brief that "[s]imple arithmetic shows that petitioner's opportunity for the accumulation of gain-time under the new statute far surpasses that which he could have earned under the old statute." In fact, petitioner's opportunity for the accumulation of gain-time under Chapter 944 as it presently exists does not

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[5] Section 944.275(5), Florida Statutes (1979), provides: "No gain-time shall be awarded except as provided in this section." This clear limitation was not previously present in Chapter 944.

surpass (nor equal) that which petitioner could have earned under Chapter 944 as it existed when petitioner allegedly committed his crime or when he was sentenced.

Furthermore, even if subsections (1)(a), (b) and (c) of Section 944.275, Florida Statutes (1975) were the first enactments to authorize discretionary extra gain-time allowances, such a fact would be totally irrevelant to the issue at hand. The cited subsections merely *authorize* the Department of Corrections to grant additional gain-time pursuant to such provisions. Such authorization must be contrasted with the statutory gain-time provided under Section 944.275 and formerly provided under Section 944.27, Florida Statutes (1975). Under both statutes, the appropriate department is mandated to grant the prescribed reductions from the sentence of every prisoner who has performed his work in the manner described by such statutes and who has committed no infraction of the rules or regulations of the appropriate department or of the laws of the State of Florida. This most significant distinction has been recognized repeatedly by respondent in his own brief where he recognizes that the new statute merely "authorizes" and "permits" the accumulation of what respondent describes as extra gain-time.[6] The new statute, just as the old statute, however, *requires* the

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[6] This distinction is emphasized by the affidavit of Louie L. Wainwright, which was attached to the response of respondent and which was reproduced in the Appendix (A 12a-13a). The affidavit shows that statutory gain-time *to be earned* is utilized in arriving at a projected release date. Conversely, only extra gain-time which has been earned in the past is utilized in such computations.

grant of *statutory* gain-time in accordance with the particular terms of each statute. Statutory gain-time for good behavior is "awarded as a matter of routine" as contrasted with "extra gain-time." Note, *Prisoner's Gain-Time: Incentive, Deterrent, or Ritual Response*? 21 U.Fla. L.Rev. 103, 104 (1968).

Again resort may be made to respondent's brief further to illustrate the point:

> "Under the old statute, the maximum amount of gain-time that could be earned was fixed and *all any person had to do* in order to be credited with the appropriate amount of gain-time at the end of each month *was to stay out of trouble.*" (Resp. Brief 25) (emphasis supplied).

In short, petitioner himself controlled his destiny relating to the 5-10-15 statutory gain-time. It is sophistry to argue that some other procedure largely discretionary in nature provides essentially the same relief. Particularly does such argument lack credibility when it is readily apparent that such discretionary procedures already coexisted with and supplemented the 5-10-15 provisions.

The Supreme Court of Florida summarized the *only difference* in the laws when it observed:

> "The new law . . . is different from the former law . . . in that there is an award of three days per month instead of five for the first two years; the award of six days per month instead of ten for the second two years; and the award of nine days per month instead of fifteen for anything over four years service of sentence."

Harris v. *Wainwright*, 376 So.2d 855, 856 (Fla. 1979). The new argument of respondent suggesting other previously unargued differences would obviously present new matter to that Court, as well apparently to other representatives of the Attorney General of Florida.[7]

Remedial Nature of Statute

Respondent contends that comprehensive remedial legislation must be "analyzed in its entirety." (Resp. Brief 26) There is no issue in that respect. However, the case cited by respondent, *State* v. *Green*, 355 So. 2d 789 (Fla. 1978), in fact expressly states that "[a]n unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining provisions. . . ." *Id.* at 794. This disposes of the professed concern of respondent for the inmates (Resp. Brief 28). In the present case, of course, petitioner does not con-

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[7] The Attorney General of Florida, without attribution to the Florida Supreme Court, has made the same assertion *verbatim* in an objection (Pet. Reply Brief A 10a) to a magistrate's report filed in *McCullough* v. *Wainwright*, No. 80-130 Civ. Tampa GC, a *habeas corpus* proceeding raising the same issue as that advanced here. The U.S. Magistrate on July 15, 1980 adopted the view urged here by petitioner (Pet. Reply Brief A 7a). In candor, counsel must question the attachment of unreported case pleadings in this fashion, but resolves the issue in favor of petitioner in light of the Attorney General's presentation of similar material in the appendix to his brief and in the transcendent right of this Court to know that the State of Florida does not speak with one voice on an issue of this import.

tend that any gain-time statute should be held unconstitutional per se; petitioner objects to the *ex post facto* application of a reduction in statutory gain-time to him. No issue is made as to any other aspect of the statute. Indeed, none could be made on this record.

Respondent has argued that numerous prisoners have sought and obtained mandamus orders to recompute gain-time under the new statute and opines that prisoners would not seek this type of relief if they believed that such relief would result in a loss of gain-time. As an illustration of the type of order which prisoners have sought and obtained, respondent has cited the order entered in *Storm* v. *Massey*, No. 00-128 (Fla. 1st DCA 1979), and has reproduced a copy of that order in his appendix (Resp. Brief A8). That order alone, however, manifestly does not reflect the situation in *Storm*; therefore, petitioner has reproduced in its appendix to this brief the remaining portions of the record in the *Storm* matter (Pet. Reply Brief A 16a *et seq.*). As is reflected in Storm's petition, Storm was "uncertain as to his tentative expiration date" and desired respondent to compute such expiration date in accordance with the statutory change. This uncertainty is not hard to understand in light of the fact that Storm did proceed *pro se*. Notably, respondent failed to argue that the new statute was ameliorative.

Withholding of Information

Finally, respondent has implied petitioner withholds information concerning extra gain-time earned by peti-

tioner since July 1, 1978.[8] The initial appendix prepared by petitioner in this very case, however, reveals extra gain-time earned by petitioner prior to January 1, 1979. (A 12a) An exhibit to respondent's response to the petition filed in the Supreme Court of Florida indicates that petitioner not only had the opportunity to earn extra gain-time prior to the existence of Section 944.275, Florida Statutes (1979), but that petitioner had actually earned forty-three days of extra gain-time prior to such time. Interestingly enough, *no* extra gain-time was earned in the period beginning on January 1, 1979.[9] This fact, reflected by a sworn affidavit filed by respondent

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[8] The charge is not only inaccurate, as explained in the text, but is also frivolous for at least two reasons. Initially, it is a matter of ordinary intelligence that a petitioner represented by counsel would not be seeking relief if the new statute benefited him more than did the old statute. Secondly, the amount of extra gain-time earned by petitioner is simply irrelevant. Petitioner is complaining of the enhancement of his punishment by decrease in the amount of statutory gain-time opportunity to which he was entitled at the time he allegedly committed the offense for which he is serving time. The relief he seeks is merely a prohibition in the reduction of statutory gain-time. An after the fact increase in permissible extra gain-time, however, ultimately has no bearing on a determination whether a concomitant decrease in mandated statutory gain-time violates the constitutional *ex post facto* provisions.

[9] The jurat is omitted in the appendix, but the original record reflects it was executed July 3, 1979. It is not clear by what means petitioner is to have updated this affidavit in this Court. Petitioner continues to assume that he was and is bound by the record below *as is respondent*.

(A 12a), flies squarely in the face of respondent's assertion at page 23 of his brief that prior to the implementation of Section 944.275, Florida Statutes, "the most gain-time that petitioner could accumulate was fifteen days per month during the fifth and subsequent years of his sentence" (i.e., statutory gain-time).

It is, therefore, clear that the changes introduced by Section 944.275, Florida Statutes (1979), cannot be described as ameliorative, and respondent's claim that in "simple truth" petitioner is now "in a materially better position" (Resp. Brief 29)' stated charitably, is ill-founded.

There remains only the question raised by respondent whether such changes, which reduce petitioner's gain-time and thereby prolong his incarceration, must violate the due process clause in order to violate the *ex post facto* prohibition. It is to this question we now turn.

THE NEW STATUTE CLEARLY IS AN EX POST FACTO LAW

There is No Due Process Issue in this Case

Respondent surprisingly asserts that petitioner's claim for relief is based on a "constitutionally protected liberty interest in unearned gain-time." (Resp. Brief 32) In so stating, respondent misconstrues not only the entire substance of petitioner's brief, but indeed the scope of this Court's grant of certiorari. The question presented by this case, stated succinctly, is whether Section 944.275, Florida Statutes (1979), as applied to petitioner,

violates Article 1, §10, clause 1 of the United States Constitution, the "*ex post facto*" clause. To the extent that petitioner briefly discussed the applicability of the due process clause of the Fourteenth Amendment to gain-time, it was only to note that accrued gain-time is protected by the due process clause, *Wolff* v. *McDonnell*, 418 U.S. 539, 557 (1974), and to assert that a liberty interest so protected when once acquired should also be a liberty interest "whose deprivation results in a forbidden increase in punishment." (Pet. Brief 56) Thus, it is rationally consistent to argue that the statutorily prescribed opportunity to acquire such liberty interest would at least conceptually be encompassed within the *ex post facto* clause.[10]

However, this Court has granted review of the *ex post facto* issue, not an issue arising under the due process clause of the Fourteenth Amendment. Petitioner does assert that Section 944.275, Florida Statutes (1979) violates the *ex post facto* prohibition, whether or not it also violates the due process clause. In this respect, respondent's citation of *Jackson* v. *Reese*, 608 F.2d 159 (5th Cir. 1979), is misleading. The Fifth Circuit in that case held that a denial of parole, as distinguished from revocation of parole, did not amount to a loss of liberty and that, therefore, it did not need to address whether the parole denial procedure comported with due process.

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[10] The fact that Florida need not grant an opportunity to acquire gain-time in the first instance is irrelevant once it is granted, *cf. Meachum* v. *Fano*, 427 U.S. 215, 226 (1976).

Id. at 160. Respondent leaps from this holding to the conclusion that "since Petitioner has not shown any deprivation of a constitutionally protected liberty interest, the court need not address the issue of whether Florida's new gain-time statute now under attack constitutes *ex post facto* legislation." (Resp. Brief 44-45) As this Court is well aware, the protection of due process comes into play where there is a denial of liberty or property. Respondent's argument, however, is that where there is no such denial, no other constitutional rights apply, or, in particular, the *ex post facto* prohibition does not apply. Neither *Jackson* v. *Reese*, *supra*, nor any other authority of which petitioner is aware, supports that amazing conclusion. The *ex post facto* prohibition is a constitutional protection separate and distinct from the due process clause.

Little else need be said concerning respondent's argument, which is devoted largely to an effort to disprove what petitioner does not contend. Respondent's remaining discussion of the applicability of the *ex post facto* prohibition is devoid of any citation of *Calder* v. *Bull*, 3 Dall. 386 (1798); *Cummings* v. *Missouri*, 4 Wall. 277 (1867); *Kring* v. *Missouri*, 107 U.S. 221 (1883); or *Lindsey* v. *Washington*, 301 U.S. 397 (1937). Respondent thus ignores some of the most important *ex post facto* decisions of this Court. Respondent does address the minority views of the New Jersey courts, which petitioner noted in discussing *Zink* v. *Lear*, 28 N.J. Super. 515, 101 A.2d 72 (N.J. App. Div. 1953). Aside from an attempt to distinguish some Louisiana cases, however, respondent does not confront the overwhelming majority

of state and federal decisions which have considered these issues and almost uniformly held statutes such as Florida's to violate the *ex post facto* prohibition.

Finally, respondent attempts to distinguish *Greenfield* v. *Scafati*, 277 F.Supp. 644 (D. Mass. 1967), *affirmed*, 390 U.S. 13 (1968). It is not too much to state that respondent completely misunderstands and, indeed, misstates the *Greenfield* holding. According to respondent, "Greenfield simply struck down a statute passed after his initial conviction which deprived parole violators of accumulated good time upon their return to prison." (Resp. Brief 47) According to the actual opinions, the Massachusetts statute did no such thing. Rather, it provided that a parole violator "shall not receive deductions described in this section [for good conduct] for any of the first six months after he has returned to the correctional institution." *Greenfield* v. *Scafati*, 277 F.Supp. at 645. The only possible distinction between *Greenfield* and the case at bar lies in the deprivation for six months of any opportunity to earn gain-time in *Greenfield*, whereas in the case at bar, the petitioner is permanently deprived of the opportunity to earn gain-time at the rate set at the time of the crime. Petitioner is unaware of any authority giving effect to such a distinction.

Respondent reverts to his "annexed" argument in attempting to distinguish *Greenfield* on the basis that the availability of good conduct deductions was considered an element of the sentence under Massachusetts law,

whereas it is not under Florida law.[11] This contention is not borne out by the record. (Resp. Brief 48)

It cannot be doubted, however, that the question whether a statute "inflicts a greater punishment, than the law annexed to the crime, when committed," *Calder* v. *Bull*, 3 Dall. 386, 390 (1798), is indeed a question of federal constitutional law. Respondent apparently relates the concept of annexation to a doctrine of "vested rights." This is entirely misplaced. It does not matter whether petitioner is entitled, as a matter of vested right, to gain-time; in *Greenfield*, for example, the prisoner's entitlement to parole lay "in the discretion of the Parole Board." 277 F.Supp. at 646. Notwithstanding the fact that there was no such entitlement, the court noted in relying on a decision of this Court:

> " It would not follow because a prisoner might not receive parole that it would not be an unlawful *ex post facto* burden to deprive him altogether of the right to be found qualified. Rather, we see no distinction between depriving a prisoner of the right to earn good conduct deductions and the right to qualify for and hence earn, parole. Each, to quote *In re Medley*, *supra*, materially 'alters the situation of the accused to his disadvantage.' "

Id. Without question, Section 944.275, Florida Statutes (1979) violates the *ex post facto* prohibition by increasing the punishment to which Petitioner may be subject.

[11] In fact the calculation of a "tentative date of release" in Massachusetts as described in *Greenfield* (277 F.Supp. at 645) is precisely the same procedure followed under the old statute in Florida, *Harris* v. *Wainwright*, 376 So.2d 855, 856 (Fla. 1979). This is conclusively shown in this case: *see* "TED" ("tentative expiration date") in upper left hand corner of petitioner's reply in the lower court (A 17a).

CONCLUSION

Respondent quotes Judge Henry Friendly's observation, "[T]here is a human difference between losing what one has and not getting what one wants." Friendly, *Some Kind of Hearing*, 123 U.Pa. L.Rev. 1267, 1296 (1974).[12] There can be no quarrel with that comparison in a different context; however, no analogy exists here. The competing values are represented on the one hand by a claim to entitlement to benefits solemnly guaranteed by a state legislature and presumptively relied upon both by prisoner and trial judge, and, on the other, by a claim of a unilateral right to reduce these benefits. The resolution of that conflict occurred at the birth of the Republic. The *ex post facto* clause was intended to preclude the necessity for such claims. If it were otherwise, the clause has been rendered meaningless.

Respectfully submitted,

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[12] Also quoted in *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S.1, 10 (1979).

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Section 944.27 Florida Statutes (1975)

944.27 Gain-time for good conduct; schedule of allowance; cumulative sentences to be treated as one sentence for purposes of allowing and forfeiting.—

(1) The [Department of Offender Rehabilitation] shall grant the following deductions for gain-time from the sentences of every prisoner who has committed no infraction of the rules or regulations of the [department], or of the laws of the state, and who has performed in a faithful, diligent, industrious, orderly, and peaceful manner the work, duties, and tasks assigned to him, to wit:

(a) Five days per month off the first and second years of his sentence;

(b) Ten days per month off the third and fourth years of his sentence; and

(c) Fifteen days per month off the fifth and all succeeding years of his sentence; and he shall be entitled to credit for a month as soon as he has served such time as, when added to the deduction allowable, would equal a month.

(2) When a prisoner is under two or more cumulative sentences, he shall be allowed gain-time as if they were all one sentence and his gain-time, including any extra gain-time allowed him under s. 944.29, shall be subject to forfeiture as though such sentences were all one sentence.

(Reviser's historical footnotes omitted in printing)

Section 944.29, Florida Statutes (1975)

944.29 Extra good-time allowance. — The [Department of Offender Rehabilitation] may allow, in addition to time credits, an extra good-time allowance for meritorious conduct or exceptional industry.

(Reviser's historical footnote omitted in printing)

Section 945.21, Florida Statutes (1975)

945.21 Regulations of the department.—

(1) The [department] is authorized to adopt and promulgate regulations governing the administration of the correctional system and the operation of the [department]. In addition to specific subjects otherwise provided for herein, regulations of the [department] may relate to:

(a) Conduct to be observed by prisoners;

(b) Punishment of prisoners;

(c) Gain-time for good conduct of, release payments to, and release transportation of, inmates;

(d) Uniforms for inmates and custodial personnel;

(e) Rules of conduct of custodial and other personnel.

(f) Classification of personnel and duties assigned thereto;

(g) Credits for confinement prior to commitment to the [department];

(h) Payments to prisoners for work performed. Such payments, if any, to be made from the profits of the Industrial Trust Fund. Such regulations to include restrictions on the use of earnings, including payments for support of dependents and release reserves.

(i) Visiting hours and privileges;

(j) Mail to and from inmates;

(k) The operation of canteens and the participation in canteen funds;

(l) The feeding of prisoners, including diet and menus, and the furnishing of health and comfort items to indigent prisoners;

(m) Such other regulations as in the opinion of the [department] may be necessary for the efficient operation and management of the correctional system.

(2) Regulations of the [department] shall be adopted and filed with the Department of State as provided in chapter 120.

(Reviser's historical footnote omitted in printing)

RULES OF THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES DIVISION OF CORRECTIONS
CHAPTER 10B-20
[Florida Administrative Code]
[Effective April 22, 1975]

10B-20.01 Authority of the Director: The Director shall effect the modification of inmate's sentences as prescribed by law and as hereinafter set forth.

10B-20.02 Gain Time. The Director shall keep a record of the conduct of each inmate. Deduction shall be made from the term of an inmate's sentence when no charge of misconduct has been sustained against the inmate and when his institutional record has been satisfactory. Such deductions shall be deemed earned and the inmate shall be entitled to credit as soon as the inmate has served such time as when added to the deductible allowance provided by statute will equal a month. An inmate serving two or more cumulative sentences shall be allowed deductions as though the sentence were all one sentence, and such deductions shall be subject to forfeiture as though the sentences were all one sentence. Deductions from the term of an inmate's sentence shall be made pursuant to the following time schedule: [5-10-15 schedule omitted.]

10B-20.03 Extra Gain Time. An inmate who faithfully performs the assignments given him in a conscientous (sic) and cheerful manner over and above that which may normally be expected of him and against whom no disciplinary report has been filed within the preceding six months, and whose conduct, personal adjustment and individual effort towards his own rehabilitation shows his desire to be a better than average inmate, may be granted on an individual basis from one to six days per month extra gain time to be deducted from the term of his sentence.

10B-20.04 Special Gain Time.

(1) An inmate who is assigned to work at the construction of a correctional institution or on any other type of building construction project authorized by the Department, and who is eligible to receive special gain time and may be granted deductions from the term of his sentence on the basis of one to fifteen days per month in lieu of extra gain time; but only for those periods of time wherein he is assigned to such construction project.

(2) An inmate who does some outstanding deed, such as the saving of a life, recapturing an escaped inmate, or who in some other manner performs an outstanding service that would merit the granting of additional deductions from the term of his sentence may be granted special gain time on the basis of from one to sixty days.

10B-20.05 Forfeiture of Deductions Earned.

(1) The Director may cause to be forfeited any and all deductions that may have been granted to an inmate for the violation by such inmate of any rule. Likewise, the Director may restore any such deduction so forfeited if in his opinion there are sufficient reasons for such restoration.

(2) If any inmate is convicted of escape, the Division may without notice or hearing declare a forfeiture of all gain time earned and extra gain time allowed such prisoner, if any, prior to such escape.

(3) Whenever a conditional pardon granted to an inmate by the Governor with the consent of at least three members of the cabinet or a conditional parole granted by the Florida Parole and Probation Commission is revoked and such inmate is ordered by the commission to be returned to the institution, such inmate may be deemed to forfeit all deductions granted

up to the time of his release under such conditional pardon or parole.

10B-20.06 Actual Release Date. In determining the actual release date of an inmate, the term of his sentence less the number of days deducted from such sentence as has been provided should be added to the sentence date. The sentence actually expires at midnight of this date, but release may be granted at any hour of such date.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 80-130 Civ.T.-GC

SAMUEL MCCULLOUGH, #055520, *Petitioner,*

v.

LOUIE L. WAINWRIGHT, Secretary
Department of Offender Rehabilitation,
State of Florida, *Respondent.*

REPORT AND RECOMMENDATION

This is a habeas corpus petition by a State prisoner, Samuel McCullough. On August 25, 1976, Petitioner entered a plea of nolo contendere and was convicted of burglary, grand larceny, possession of a firearm by a convicted felon and carrying a concealed weapon. Upon his plea, Petitioner was sentenced to fifteen (15) years imprisonment on each charge, with all sentences to run concurrently.

Petitioner does not complain of his conviction nor the sentence. Rather, he seeks to shorten the possible duration of his confinement. Petitioner's complaint focuses on a change in the provision of Florida Statutes §941.27, relating to "gain time." At the time of Petitioner's conviction in 1976, Florida Statutes provided that every prisoner *shall* be granted "gain time" credit. Thereafter, effective July 1, 1978, Florida Statutes, §941.27 was repealed and §941.275 was adopted. Florida Statutes, §941.275 provides a new, less generous "gain time" schedule.

In light of the amendment to the statutory provision relating to the "gain time" schedule, Petitioner complains that he could potentially serve a greater term of imprisonment

than he would have served under Florida Statutes, §941.27, which was in effect at the time he was sentenced. Petitioner urges that the amendment changed the law to his disadvantage after his sentencing, and is therefore void as to him because of the prohibition contained in the United States Constitution against *ex post facto laws.*

Respondent urges, however, that the subsequent amendment of the "gain time" statute does not deny Petitioner any vested right; it is Repondent's position that the gain time provision is a matter of legislative grace.

Petitioner has presented his claim by means of a petition for writ of habeas corpus to the Florida Supreme Court. The Court denied Petitioner's application, based on the precedent of *Harris* v. *Wainwright*, _____ So.2d _____ (Fla. 1979), a copy of which decision is attached as Exhibit II to the Supplemental Response filed herein, and on the precedent of *Genter* v. *Graham*, _____ So.2d _____ (Fla. 1979), a copy of which is also attached to the Supplemental Response filed herein. Respondent relies on the rationale and opinion of the Florida Supreme Court in *Harris.*

A grant of parole (rather than a right to early release, subject only to the continued good behavior of a prisoner), provides no more than a mere hope that a benefit may be obtained). [*See Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1 (1979)]. However,

> ". . .the State having created the *right* to good time and itself, recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances

and required by the Due Process Clause to insure that the State created right is not arbitrarily abrogated." [*Wolff* v. *McDonald*, 418 U.S. 539, 557 (1973)].

A reading of relevant cases indicates that Petitioner and others similarly situated have a "liberty interest" as a result of "gain time" statutes. In light of this, the application of the provisions of Florida Statutes, §941.275, instead of the provisions of its predecessor, Florida Statutes, §941.27, is an abrogation of Petitioner's rights. Based on *State* v. *Curtis*, 363 So. 2d 1375 (La. 1978), and the Federal cases cited therein, I recommend that the petition be granted and that the Petitioner be afforded the opportunity to earn gain time pursuant to the provisions of Florida Statutes, §941.27, which was the controlling statutory provision at the time he was sentenced. See also: *Shepherd* v. *Taylor*, 556 F.2d 648 (2d Cir. 1977). At this time, there are several other petitions for writ of habeas corpus which raise the same issue, pending in this court. To promote judicial economy and efficiency, perhaps at some early stage these cases should be consolidated.

This *15th* day of July, 1980, at Tampa, Florida.

PAUL GAME, JR.
Paul Game, Jr.
United States Magistrate

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 80-130 Civ.T.-GC

SAMUEL MCCULLOUGH, *Petitioner,*

v.

LOUIE L. WAINWRIGHT, Secretary
Department of Offender Rehabilitation, State of Florida,
Respondent.

TO: The Honorable Geroge C. Carr, United States District Judge.

OBJECTIONS TO REPORT AND RECOMMENDATION OF MAGISTRATE AND REQUEST FOR DE NOVO HEARING OR, IN THE ALTERNATIVE DE NOVO CONSIDERATION

The Magistrate has ruled that Petitioner is being deprived of "gain time" by an ex post facto law. The Magistrate opines that since Section 944.275, Florida Statutes (1978) permits the accumulation of a lesser amount of gain time than did its predecessor, Section 944.27, Florida Statutes, then the application of the new statute to Petitioner makes the statute an ex post facto law as it was not in effect at the time of the commission of the crimes for which Petitioner stands convicted. With due respect, the Honorable Magistrate is wrong.

The new law (1978) is different from the former law in that there is an award of three days per month instead of five for the first two years; the award of six days per month instead of ten for the second two years; and the award of nine days per month instead of fifteen for anything over four years service of sentence.

II

This habeas action presents the identical question which the United States Supreme Court has agreed to decide in *Weaver* v. *Graham*, No. 79-5780, cert. granted 48 L.W. 3602. See 48 L.W. 3632. Further consideration of this case should have been stayed by the Magistrate, pending the Supreme Court's decision in *Weaver* v. *Graham*, supra.

III

Appellate courts throughout the country have repeatedly recognized that the allowing of gain time is an act of grace and that a prisoner has no right to receive gain time in the absence of a legislative provision therefor. In other words, gain time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied. See *Gilstrap* v. *Clemmer*, 284 F.2d 804 (4th Cir. 1960); *Hiatt* v. *Compagna*, 178 F.2d 42 (5th Cir. 1949) affirmed 340 U.S. 880, 71 S.Ct. 192, L.Ed. 639 (1950); *Estabrook* v. *King*, 119 F.2d 607 (8th Cir. 1941); *Kastel* v. *Fish*, 36 F.Supp. 700 (D.C.Md. 1931); *Shattuck* v. *Grider*, 493 P.2d 829 (Okl. Cr. 1972) citing with approval *Dear* v. *Mayo*, 153 Fla. 164, 14 So.2d 267 (1943); *People ex rel. Colletti* v. *Pate*, 31 111.2d 354, 201 N.E.2nd 390 (1964); *Comerford* v. *Commissioner of Correction*, 335 Mass. 714, 141 N.E.2d 893 (1957); *Lembersky* v. *Parole Board of Department of Correction*, 332 Mass. 290, 124 N.E.2d 521 (1954).

The Florida courts have taken a similar view. *Mayo* v. *Lukers*, 53 So.2d 916 (Fla. 1951) recognizes that the right to gain time is not a vested one and that it is obviously dependent on the course of the conduct of the inmate. The Florida Supreme Court has emphasized the legislature's power to make whatever changes it deems prudent in the gain time pro-

cedure. In *Dear* v. *Mayo*, 153 Fla. 164, 14 So.2d 267 (1943), the Florida Supreme Court said that parole and gain time is granted by the sovereign as a matter of grace rather than of right and that the state may offer such grace under and subject to such conditions as it may consider most conducive to accomplish the desired purpose. In *Kimmons* v. *Wainwright*, 338 So.2d 239 (Fla. 1st DCA 1976), the court said that gain time is given to prisoners through the beneficence of the legislature, and the legislature has full authority to establish the terms and conditions thereof.

V

This is not a situation in which a new law has been passed eliminating the allowance of gain time in certain situations. *Dowd* v. *Sims*, 229 Ind. 54, 95 N.E.2d 628 (1950). This is not a situation in which the entire scheme of criminal penalties has been revised. *Goldsworthy* v. *Hannifin*, 86 Nev. 252, 468 P.2d 350 (1970). It is not a situation in which the length of incarceration for juvenile offenders has been extended. *In re Dewing*, 19 Cal.3d 54, 136 Cal.Rptr. 708, 560 P.2d 375 (1977); *In re Valenzuela*, 275 Cal.App.2d 483, 79 Cal.Rptr. 760 (3rd Dist. 1969). Likewise, it is not a situation involving a new and different interpretation of existing law. *Love* v. *Fitzharris*, 460 F.2d 382 (9th Cir. 1972).

VI

Petitioner was originally sentenced to ten years and except for the grace of the Florida legislature, Petitioner is required to serve his full ten years. The gain time statute is not a method of *initially* computing an inmate's prison time. The Florida legislature is free to revoke, modify, or pass statutes dealing with the operation of its prison system without fear of Federal intervention.

A *federal* prisoner does not have a vested right in earned good-time, and good-time earned does not operate to reduce his original sentence. *Cooper* v. *United States Board of Parole*, 337 F. Supp. 235 (D.C.Ark. 1972).

The right to good time deductions is a privilege bestowed by the legislature. *Singleton* v. *Tooney*, 218 F.2d 526 (1955).

The right to good-time allowance under former section 710 of the United States Code was contingent and does not become vested until prisoner had earned the right by compliance with such section, and *Congress, having extended the privilege, could withdraw it except as to those persons in whom the privilege had ripened into a vested right. Douglas* v. *King*, 110 F.2d 911, 127 A.L.R. 1200 (1940); *Estabrook* v. *King*, 119 F.2d 607.

A good-time statute is effective not only to persons brought to prison after the date of enactment, but also as to persons brought to prison before its date. *Kastel* v. *Fish*, 36 F.Supp. 700.

Whether there is a repeal of a statute providing for a good-time allowance by the enactment of a later statute on the same subject depends on the intent of the legislature. *Kastel* v. *Fish*, supra; *Kobler* v. *Nicholson*, 117 F.2d 344; *Singleton* v. *Shafer*, 313 F.Supp. 1094 (1970).

A statute passed *after* the enactment of a statute providing for deductions from sentences for good conduct has been construed as amending and modifying the latter. *Bickel* v. *Hiatt*, 66 F.Supp. 748.

A good-time statute is not invalid because it modifies the effect of statutes in force before its enactment. *Chandler* v. *Johnston*, 133 F.2d 139.

Federal courts should refuse to interfere with internal state prison administration except in the most extreme cases involving shocking deprivation of fundamental rights. *Baldwin* v. *Smith*, 446 F.2d 1043 (2nd Cir. 1971).

State should be given broad discretion to determine which of the variety of possible rehabilitative and disciplinary techniques will be most effective. *Balwin* v. *Smith*, supra.

Good-time allowances do not reduce sentence but only enable the prisoner to serve the latter part of his sentence outside prison walls, 313 F.2d 21 (10th Cir. 1962).

The early release of prisoners under a good-time statute is a matter of legislative grace and is not constitutionally mandated. *Earnest* v. *Willingham*, 406 F2d 681 (10th Cr. 1969); *Alvarez* v. *Turner*, 422 F.2d 214 (10th Cir. 1970).

The repeal by the state of its statute authorizing commutation or diminutation of sentence for good behavior *did not constitute an ex post facto law inflicting greater punishment*. *Singleton* v. *Shafer*, 313 F.Supp. 1094 (1970).

VII

WHEREFORE, your undersigned respectfully moves this Honorable Court to reject the Report and Recommendation of the Magistrate and dismiss the instant habeas petition. In the alternative, your undersigned prays that further consideration of this case be stayed pending the United States Supreme Court's decision in *Weaver* v. *Graham*, No. 79-5780, cert. granted 48 L.W. 3602 (1980). See 64 L.Ed 270 (1980). Respondent hereby requests a hearing de novo, or a de novo determination of the issues herein.

Respectfully submitted,

JIM SMITH
Attorney General
MICHAEL A. PALECKI
MICHAEL A. PALECKI
Assistant Attorney General
Park Trammell Building
1313 Tampa Street
Suite 804
Tampa, Florida 33602
Counsel for Respondent

(Certificate of service omitted in printing)

IN THE FIRST DISTRICT COURT OF APPEALS
Tallahassee, Florida

Case No. 74-208 CF-A-01, [illegible]
JIM K. STORM, *Petitioner,*

v.

R.D. MASSEY, *Respondent,*
L.L. WAINWRIGHT, *Additional Respondent.*

PETITION FOR WRIT OF HABEAS CORPUS OR FOR WRIT OF MANDAMUS

JURISDICTION

Jurisdiction of this Honorable Court is invoked pursuant to the *Florida Constitution; Article V; Section 4(6)(3); and Florida Appellate Rules, Rule 4.5.*

JIM K. STORM
Petitioner, pro se
P.O. Box 221
Raiford, Florida 32083

Comes now Jim K. Storm, Petitioner in pro se, and presents this his petition for a writ of habeas corpus, and a petition for writ of mandamus, and represents that he is being denied gain time by Respondents in contravention of the Laws, and statues [sic] of the State of Florida, and says:

Appellant would respectfully request this Honorable Court to take Judicial Notice that the standards to measure pro se petitions are loose enought [sic] to accommodate the inartful pleader. *See Haines* v. *Kerner,* 404 U.S. 519, 520-521. 92 S.Ct. 594, 595-596. 30 L.Ed. 2nd 652, 653-654 (1972); cf. *Faretta* v. *California,* 422 U.S. 806, 95 S Ct. 2525 45 L Ed 2d 562 (1975)

STATEMENT OF THE FACTS

In October 1974, Collier County Petitioner was sentenced to five (5) years, Case No. 74-208 CF-A-01. In April of 1977, Petitioner was charged with escape, and received a two, and one half (2 1/2) year sentence, also the loss of approximately 303 days good time. Case No. 77-2221-C, Hillsborough County. Petitioner release date on said five (5) years is August 31, 1978.

Petitioner received a tentative expiration date of November 7, 1979 issued by Respondent R.D. Massey. This was issued approximately November 30, 1978. Petitioner is now stating. Petitioner has not been updated with earned gain time allowed to Petitioner by Law pursuant to chapter 78-304, Laws of the State of Florida, affective [sic] July 1, 1978.

Petitioners [sic] work supervisor Sgt. M.C. Shaw, and Petitioners [sic] clarification officer agreed to that Petitioner would be given full and maximum gain aloted [sic] by Law, pursuant to chapter 78-304, Laws of the State of Florida. Therefore Petitioner would have an approximate release date of July, 1979.

Petitioner is now stating negligence on the part of the Respondent to update Petitioners [sic] new release date in which Respondents are compelled by Law to do; *Claxton Davis* v. *Wainwright* case No. 54-968 (Fla. Sup. Ct. 2/8/79).

Petitioner states that if a new release date is not updated by Respondents, Petitioner could be, or will be illegally detained by the Correctional Department of the State of Florida.

ARGUMENT

Mandamus issues to force implimentation [sic] of new Florida gain time Statute.

Claxton Davis v. *Wainwright,* case No. 54-968 (Fla. Sup.Ct. 2/8/79). A new gain time Law was enacted by the

1978 Florida legislature, to be effective July 1, 1978 in August 1978. Petitioner Davis sought a peremptory unit of Mandamus to force the defendant department of corrections commissioner to implement the new Law. The court entered the following order;

Whereas, the Supreme Court of The State of Florida, has directed the peremptory wait of Mandamus issue against you, this is therefore, to command that you, L.L. Wainwright etc. allow the gain time to this petitioner pursuant to Chapter 1978, C. 78-304 §2, eff. July 1, 1978.

PRAYER

Therefore Petitioner herein prays this Honorable Court to promptly order the Respondents to correctly commpute [sic] the afore named, [sic] providing Petitioner with the approximately six (6) months gain time from July 1, 1978 to December 31, 1978, or as an alternative, for this Honorable Court to determine the correct release date of Petitioner.

In the intirist [sic] of Justice, and that further irriparable [sic] injury not continue. Petitioner prays this Honorable Court for the relief requested herein, and any other relief the Court deems proper.

AFFIDAVIT IN FORMA PAUPERIS

I. Jim K. Storm, hereby dose [sic] depose and say, that I am the Petitioner in the above styled cause, and that I am without funds, or security, and hereby move to be allowed to procede [sic] in Forma Pauperis in these matters.

(Jurat omitted in printing)

JIM K. STORM
53179
Petitioner, pro se
P.O. Box 221
Raiford, Florida

(Certificate of service omitted in printing)

[TRANSCRIBED FROM LONGHAND]

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Case No. 00-128

JIM K. STORM, *Petitioner,*

v.

R.D. MASSEY, *Respondent.*

ORDER TO SHOW CAUSE

Respondent is directed to show cause, within twenty days, why the relief requested by the petition should not be granted. Florida Rules of Appellate Procedure 9.100(f). Any reply by petitioner to the response may be filed within ten days after the date appearing in the certificate of service of the response, unless otherwise ordered by the court.

By Order of the Court dated this 20th day of June, A.D. 1979. Acting Chief Judge E.R. Mills, Jr., Judge Richard W. Ervin, III and Judge Ann E. Booth.

A True Copy

ATTEST:

RAYMOND E. RHODES, *Clerk*

SANDRA JOYNER,
Deputy Clerk
District Court of Appeal,
First District
Tallahassee, Florida

IN THE DISTRICT COURT OF APPEALS
FIRST DISTRICT, STATE OF FLORIDA

Case No. 00-128

JIM K. STORM, *Petitioner,*

v.

R.D. MASSEY, *Respondent.*

RESPONSE

COMES now respondent, by and through his undersigned attorneys, and makes this response to the order to show cause heretofore entered in the captioned proceeding on June 20, 1979 and says:

I.

Respondent holds petitioner in custody pursuant to commitments issued November 4, 1974 and August 1, 1977, copies of which are attached as Exhibits 1 and 2 respectively.

II.

Apparently petitioner is uncertain as to his tentative expiration date and desires respondent to compute same for him. Accordingly respondent attaches hereto the affidavit of Louis L. Wainwright showing a computation of petitioner's time and a tentative expiration date of October 30, 1979. This affidavit is attached as Exhibit 3. The computation of time as shown in Exhibit 3 takes into consideration Section 944.275, Florida Statutes, effective July 1, 1978, but not implemented by the Department of Corrections until January 1, 1979. This means that petitioner's gain time is based on the old statute, Section 944.27, Florida Statutes, up until January 1, 1979, even though the statute was repealed effective July 1, 1978.

III.

The new gain time statute, Section 944.275, Florida Statutes, is not an *ex post facto* law and does not deprive petitioner or any other prisoner of any vested right. See A.G.O. 078-96, copy of which is attached as Exhibit 4.

IV.

Each and every allegation challenging the legality of petitioner's incarceration not heretofore specifically answered or denied is hereby severally denied and the contrary allegation lodged.

CONCLUSION

The petition for writ of habeas corpus should be denied.

JIM SMITH
Attorney General

WALLACE E. ALLBRITTON
Wallace E. Allbritton
Assistant Attorney General

Counsel For Respondent
The Capitol
Tallahassee, Florida 32301

(Certificate of service omitted in printing)

DEPARTMENT OF CORRECTIONS

1311 Winewood Boulevard
Tallahassee, Florida 32301
Telephone: (904) 488-5021

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF LEON

Personally appeared before me this day Louie L. Wainwright, who being duly sworn deposes and says:

That he is the Secretary of the Department of Corrections; that as such Secretary he is the official custodian of all prisoners and the records pertaining thereto;

That Jim King Storm, #043831, was originally received into the Department on November 22, 1974, under sentence of five (5) years with credit for 57-days county jail time, imposed November 4, 1974, in the Collier County, Florida, Circuit Court. On August 1, 1977, he received a two and one-half (2 1/2) years sentence in Hillsborough County, Florida, Circuit Court to run consecutive to his original five (5) years sentence;

That the current tentative expiration date of Jim King Storm's cumulative sentence is October 30, 1979, calculated as follows:

Sentence begins 11/4/74	27336 (Days elapsed since 1900)
Sentence in days (cumulative)	+2738
Jail Time Credit	-57
Statutory Gain Time earned prior to 1/1/79 on 1551 days served	-801

Gain Time forfeited due to escape	+180
Time out on escape	+24
Extra Gain Time earned prior to 1/1/79	-84
Statutory Gain Time earned or to be earned from 1/1/79 on 303 days remaining to be served on sentence	-127
Work Gain Time earned since 1/1/79	-52
Tentative Expiration Date 10/30/79	29157 (Days elapsed since 1900)

LOUIE L. WAINWRIGHT
Louie L. Wainwright
Secretary

Department Of Corrections

(Jurat omitted in printing)

STATE OF FLORIDA
DEPARTMENT OF LEGAL AFFAIRS

Office Of The Attorney General
The Capitol
Tallahassee, Florida 32304

July 18, 1978

Mr. Louie L. Wainwright
Secretary, Department of
Offender Rehabilitation
Tallahassee, Florida 32301

Re: GAIN-TIME—PRISONERS—DEPARTMENT OF OFFENDER REHABILITATION—applicability of new gain-time formula prescribed by 1978 House Bill 811 to all inmates incarcerated on July 1, 1978. House Bill 811; §944.27, f.S. (1977), §944.275, F.S. (1978 Supp.).

Dear Mr. Wainwright:

This is in response to your request for an opinion on the following questions regarding 1978 House Bill 811, effective July 1, 1978:

(1) Does House Bill 811 Affect All Inmates Incarcerated In The Department Of Offender Rehabilitation On That Date?

(2) If The Answer To Question (1) Above Is No, Does House Bill 811 Apply To All Persons *Sentenced* After July 1, 1978, Or Only To Persons Sentenced For Crimes *Committed* After July 1, 1978?

House Bill 811, the effective date of which is July 1, 1978, revised the formula by which gain-time may be granted

to prisoners by the Department of Offender Rehabilitation. Sections 944.27, 944.271 and 944.29, F.S. (1977), were repealed and a new §944.275, F.S., was created to replace the repealed sections. I have found nothing in the new §944.275, or in any section of HB 811, or in the title to the bill, indicating that the new gain-time provisions were not intended to apply to all prisoners incarcerated by the Department of Offender Rehabilitation on July 1, 1978. There is no language in the bill limiting or delaying application to those prisoners sentenced after July 1, 1978, nor is there any language limiting application to those prisoners incarcerated for crimes committed after July 1, 1978. In addition, I know of no constitutional prohibition or rule of construction which would be invoked or violated by the application of the new formula to all inmates incarcerated by the Department as of the effective date of the act (July 1, 1978). I find nothing to indicate that the statute will not operate prospectively only. Also, nothing in HB 811 imposes any additional penalty for a crime already committed, or makes more severe punishment already imposed, and nothing in the bill purports to deprive any inmate or any vested, enforceable right.

Although the courts have imposed certain procedural requirements as being necessary to guarantee due process when previously granted gain-time is to be forfeited by action of an administrative agency, such as the Department of Offender Rehabilitation, e.g., Rankin v. Wainwright, 351 F. Supp. 1306 (M.D. Fla. 1972), it sees clear that the *Legislature's* allowance of gain-time and its modification, restriction, or even abolition of gain-time is subject to the broad discretion of the Legislature. The courts have repeatedly emphasized that the allowing of gain-time is an act of grace, and that a prisoner has no right to receive gain-time absent the Legislature's exercise of its grace or discretion.

Similarly, the courts have emphasized the Legislature's power to make whatever changes it deems prudent in the gain-time procedure. In Dear v. Mayo, 14 So.2d 267 (Fla. 1943), the court stated: "Parole and gained time is granted by the sovereign as a matter of *grace rather than of right,*" and that "[t]he state may offer such grace under the subject to such conditions as it may consider most conducive to accomplish the desired purpose." (e.s.) In Mayo v. Lukers, 53 So.2d 916, 917 (Fla. 1951), it was stated that "[t]he cases generally hold that the granting of the gain-time allowance is an act of grace rather than a vested right which may be withdrawn, modified, or denied, dependent on the course of conduct of the prisoner." And, in Kimmons v. Wainwright, 338 So.2d 239 (1 D.C.A. Fla. 1976), the court stated that "[g]ain-time is given to prisoners through the beneficence of the Legislature, and the Legislature has full authority to establish the terms and conditions thereof."

Thus, your first question is answered in the affirmative, and, accordingly, your second question need not be addressed.

SUMMARY

House Bill 811, which revises the method of granting gain-time, applies to all inmates incarcerated by the Department of Offender Rehabilitation on July 1, 1978, the effective date of the bill.

Sincerely,

ROBERT L. SHEVIN
Robert L. Shevin
Attorney General

Prepared By:

JERALD S. PRICE
Jerald S. Price
Assistant Attorney General

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Case No. 00-128

JIM K. STORM, *Petitioner,*

v.

R.D. MASSEY, *Respondent.*

ORDER

The petitioner's "Request To Take Judicial Notice" is noted. Petitioner's gain time was recomputed after this court's mandate of August 2, 1979, ordering the Department of Corrections to comply with Chapter 78-304, Laws of Florida, and implemented Section 944.275, Florida Statutes (Supp. 1978), as of July 1, 1978. Chapter 78-304 is not an unconstitutional ex post facto law as applied to petitioner. "[T]he granting of the gain time allowance is an act of grace rather than a vested right. . . ." *Mayo* v. *Luker,* 53 So.2d 916 (Fla. 1951). Accord, *Kimmons* v. *Wainwright,* 338 So.2d 239, 240 (Fla. 1st DCA 1976). Moreover, the gain time statute does not concern the crime one is convicted of or the statutory sentence for that crime: "It is an established rule of construction that constitutional provisions regarding ex post facto laws relate only to criminal and penal laws, and the prohibition against ex post facto laws is directed primarily against substantive changes in statutes concerning crimes of penalties. . . ." 9 Fla. Jur., *Criminal Law* §64, p. 102.

By Order of the Court dated this *28th* day of September, A.D. 1979, Chief Judge E.R. Mills, Jr., Judge Richard W. Ervin, III and Judge Anne C. Booth.

A True Copy

ATTEST:

Raymond E. Rhodes, *Clerk*

RAYMOND E. RHODES
District Court of Appeals,
First District
Tallahassee, Florida

STATE OF FLORIDA
UNIFORM COMMITMENT TO CUSTODY
OF DIVISION OF CORRECTIONS

IN THE TWENTIETH JUDICIAL CIRCUIT COURT

Collier County. Fall Term, 1974

Conviction for Count 11—Uttering A Forged Instrument

Date of conviction: November 4th, 1974

Date of sentence imposed: November 4th, 1974

Term of sentence: Five (5) Years State Prison, credit given for time served of 57 days.

STATE OF FLORIDA, *Plaintiff,*

v.

JIM KING STORM, *Defendant.*

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DIVISION OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of Information judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the custody of the Division of Corrections of the State of Florida; and this is to command you, the said Division of Corrections,

by and through your director, superintendents, wardens, and other officials, to keep and safety imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Division of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable Harold S. Smith

Judge of said Court, as also Margaret T. Scott

Clerk, and the Seal thereof, this the 4th day of November, 1974

MARGARET T. SCOTT, *Clerk of said Court*

By: PEGGY ROGERS D.C.

(To be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)

STATE OF FLORIDA
UNIFORM COMMITMENT TO CUSTODY
OF DIVISION OF CORRECTIONS

CIRCUIT COURT-CRIMINAL JUSTICE DIVISION

Hillsborough County. Spring Term, 1977

Conviction for Escape

Date of conviction: August 1st, 1977

Date of sentence imposed: August 1st, 1977

Term of sentence: Two and one-half (2 1/2) years to run consecutively with present sentence now serving and concurrently with 77-2388-C.

STATE OF FLORIDA, *Plaintiff,*

v.

JIM KING STORM, *Defendant.*

Case No. 77-2221-C

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DIVISION OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the

custody of the Division of Corrections of the State of Florida; and this is to command you, the said Division of Corrections, by and through your director, superintendents, wardens, and other officials, to keep and safety imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Division of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable Robert W. Rawlins, Jr.

Judge of said Court, as also James F. Taylor Jr.

Clerk, and the Seal thereof, this the 1st day of August, 1977

JAMES F. TAYLOR, JR. *Clerk of said Court*

By:LINDA GRENE

(To be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)